Supreme Court, U.S.
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OFFICE

No.

In the

Supreme Court of the United States

ARTHUR H WILLIAMS,

Petitioner,

versus

CIGNA FINANCIAL ADVISORS INCORPORATED; CIGNA INDIVIDUAL FINANCIAL SERVICES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts herein erred in failing to find that Respondents failed to meet their burden to establish that the arbitration agreement upon which they relied to obtain a stay of this litigation and ultimately enforcement of an arbitration award which did not properly enforce Petitioner's rights under the ADEA was appropriate, knowing, voluntary, or met any other pre-conditions to enforcement required by text, legislative history, and purpose of ADEA, as amended by the OWBPA and §118 of the 1991 CRA, and by failing to find the parties' agreement was excluded from the FAA's coverage?

2. Whether the lower courts herein erred in failing to adopt and apply the proper standard of review for lower courts to apply to challenges to mandatory arbitration decisions involving statutory discrimination claims, in this case, brought under the ADEA, and instead adopting and applying a standard of review which is contrary to the text, legislative history and purpose of the ADEA, as amended by the OWBPA and §118 of the 1991 CRA, this Court's decisions, and the decisions of other circuit courts of appeal?

3. Whether the lower courts herein erred in finding that Petitioner was not retaliated against by Respondents when they denied him significant opportunities for continued employment in a lesser role with their organizations because he filed a charge of discrimination with the EEOC and in finding that he had not suffered an "adverse employment action" in a manner contrary to the text, legislative history, and purpose of the ADEA, this Court's prior decisions, and the decisions of circuit courts of appeal?

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The district court's initial order denying Respondents' motion to compel arbitration and for a stay of proceedings is set forth in the Appendix, p. 45-47. The opinion of the Fifth Circuit Court of Appeals reversing the district court and compelling arbitration is set forth in the Appendix, p. 31-44, and is reported at 56 F.3d 658 (5th Cir. 1995). The arbitrator's pre-hearing rulings and their decision and award are set forth in the Appendix, p. 48-61. The district court's order granting Respondents' motion to enforce the award and denying Petitioner's motion to vacate is set forth in the Appendix, p. 62-70. The Fifth Circuit's second opinion partially reversing the District Court as to the appropriate standard of review, but affirming the result, is set forth in the Appendix, p. 1-30, and is reported at 197 F.3d 752 (5th Cir. 1999).

JURISDICTION

The statutory provision governing this Court's jurisdiction is 28 U.S.C. §1254.[1] Petitioner originally filed this action in a Texas state court on April 13, 1994, but after service was obtained, it was removed to the United States District Court for the Northern District of Texas by Respondents on May 16, 1994. After filing a motion to dismiss and conducting discovery, Respondents eventually filed a motion to stay the proceedings to compel arbitration on September 28, 1994. The district court denied the motion on October 27, 1994, (App. p. 45-47), and the Respondents took an interlocutory appeal to the Fifth Circuit Court of Appeals, which reversed the district court's decision and remanded the case for entry of a stay while the case was submitted to arbitration on June 19, 1995. (App. p. 31-44).

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[1]Jurisdiction may also be appropriate here under 9 U.S.C. §16(a), although the Fifth Circuit adopted and applied a "manifest disregard of law" standard of judicial review in this case which exceeded the review authority typically afforded by the FAA, relying upon this Court's approval of that review standard in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). (App. p. 13-20).

Following the Fifth Circuit's decision, the district court entered a stay and the case was referred and submitted to arbitration under NASD procedures, and an arbitration hearing was conducted in October of 1996. Petitioner then filed a motion to lift the stay and vacate the arbitrators' award and Respondents cross-filed a motion to enforce the arbitration award. The district court entered an order granting Respondents' motion and denying Petitioner's motion on August 11, 1997, and then entered final judgment dismissing Petitioner's ADEA action and other claims with prejudice on August 25, 1997. Petitioner timely appealed to the Fifth Circuit Court of Appeals, which partially reversed the District Court on the appropriate standard of review to be applied, but affirmed the result by opinion dated December 6, 1999. Petitioner has timely filed this Petition for a Writ of Certiorari within 90 days of the Fifth Circuit's final decision in this matter.

STATEMENT OF THE CASE

Petitioner Arthur Williams originally work for Respondents in the 1960s and 1970s, and then was rehired as a Registered Representative (active agent) by Respondents in July of 1987 when he was 58 years old to sell insurance and financial products, including securities. (R. Vol. 5, AHT 50, 141).[2] Respondents employ three types of agents: (1) an active agent who is provided an office, some office support and all fringe benefits, (2) a broker who is not provided an office, office support or fringe benefits; and (3) a "retired" agent who is provided an office, some office support and most fringe benefits. (R. 568, R. Vol. 5, AHT 386-390).

Petitioner signed a registered representative's agreement upon his return to work on July 15, 1987, which required him to register with the NASD and to become familiar with and comply with NASD's rules and regulations. (See, Appellants'

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[2] "AHT" refers to the arbitration hearing transcript which is contained in R. Vol. 5.

(Respondents) Brief in (first) Appeal No. 94-11030, p. 4, citing to sworn Declarations of Larry F. Phillips dated May 16, 1994, ¶¶7-14, attached to Defendant's motion to dismiss filed May 20, 1994, and dated September 23, 1994, attached to Defendant's Motion to Stay). The representatives agreement required him to register with NASD and to become familiar with NASD's rules and regulations. (Id., p. 5, Second Phillips Declaration 9/23/94). Two days later, Petitioner signed a U-4 registration form with NASD in which he agreed to comply with the NASD rules "as they are and may be adopted, changed or amended from time to time," and agreed to arbitrate any disputes with Respondents that are required to be arbitrated under NASD's rules and regulations. (*Id.*).

It is undisputed that at the time these documents were signed, the NASD rules did not, nor do they presently, require arbitration of employment disputes.[3] The Securities and Exchange Commission (SEC) adopted new NASD rules effective October 1, 1993, providing that disputes between a member and a person associated with a member "arising out of the employment or termination of employment of associates person(s) with any member" were now subject to arbitration. See 58 Fed. Reg. 39,070, 39,071 (July 21, 1993). Petitioner executed a second U-4 registration form on October 20, 1993, so he could sell securities in Colorado. (*Id.*, pp. 7-8). But for the express language of the parties' representatives agreement, Petitioner may have registered with an exchange which did not require signing of such an agreement, such as AMEX. *See, e.g., Kovaleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999).

After Williams filed suit under the ADEA, Cigna eventually filed a motion to stay the proceedings to compel

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[3]During the pendency of the second appeal, the SEC amended the NASD rules effective January 1, 1999, to eliminate the requirement that statutory employment discrimination disputes, such as this, between associates and members be arbitrated. *See*, 63 Fed. Reg. 35,299 (June 28, 1998). This would preclude further arbitration on remand under the parties' agreement.

arbitration based on these agreements, which the District Court denied. (App. p. 45-47). Respondents took an interlocutory appeal to the Fifth Circuit, which reversed, rejecting Petitioner's objections that the agreement was contrary to the ADEA, as amended, and Sections 1 and 2 of the FAA. (App. p. 31-44). There was no showing by Respondents in the entire record below, however, establishing that either Respondents or Petitioner were aware of this Rule change at the time Petitioner signed his second U-4 registration form, or that Petitioner had ever knowingly and voluntarily agreed to waive any substantive or procedural rights, or jury trial or judicial forum rights, and particularly any rights to have the ADEA properly enforced in a fundamentally fair and neutral hearing process which is subject to meaningful judicial review, under the ADEA, as amended, as Plaintiff has consistently maintained throughout this action.[4]

Petitioner Williams performance was satisfactory over the initial few years of his re-employment, however in 1992, Respondents ranked him 13th out of 16 similarly situated agents, and in 1993 Respondents claimed that he had the lowest sales out of 15 similarly situated agents. (R. Vol. 5, AHT 93, 109, 386; R. Vol. 5, AH Def. Exhs. 2 and 3). Petitioner Williams also incurred a significant outstanding loan balance during this period which Respondents contended was more than other similarly situated active agents owed. (R. Vol. 5, AH Def. Exhs. 2 and 3).

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[4]Although Petitioner has consistently maintained this position, Petitioner did not submit any evidence on this point to the trial court prior to the interlocutory appeal, but later did so by affidavit presented in support of his motion to lift the stay and vacated that was a subject of the second appeal. (R. Vol. 5, Motion to Lift Stay and Vacate [MTV], Exh. 1 and 1A). *See also*, App. 41a-42a. As Respondents contended the arbitration agreement effected a waiver of certain ADEA rights, it was Respondents' burden to prove the existence of an express agreement covering the dispute which was appropriate and knowingly and voluntarily entered within the meaning of the ADEA, as amended by the OWBPA and §118 of the 1991 CRA. 29 U.S.C. §626(f)(3); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 19 (1st Cir. 1999).

Petitioner's supervisor, Larry Phillips ("Phillips") informed Petitioner Williams on several occasions that his sales production and debt load was unsatisfactory. (R. Vol. 5, AHT 111-114). On December 16, 1993, Phillips submitted paperwork to Respondent's human resources departments to authorize Petitioner's termination. (R. Vol. 5, AHT 394; R. Vol. 5, AH Def. Exh. 20). Phillips and another supervisor, Jim Lassiter, then met with Petitioner Williams on December 22, 1993. (R. Vol. 5, AHT 127-128, 395-396). Phillips told Petitioner Williams that he had three options (1) become a broker, (2) take retired agent status or (3) keep his same job as an active agent, if he paid down his debt. (*Id.*, AHT 395-396, 388-390, 406-407). Phillips informed Petitioner that he had to choose one of these three options or he would be terminated. (*Id.*, AHT 408). However, Phillips admitted that he did not recall either himself or Lassiter ever telling Williams during the December 22, 1993, meeting that he was fired or terminated. (*Id.*, AHT 407-408). On January 5, 1994, Petitioner filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC) alleging that Respondent's conduct violated the Age Discrimination in Employment Act ("ADEA"). (*Id.*, AH Cl. Exh. 2).

Petitioner Williams continued working in Respondents' employ selling Respondents' products through January 12, 1994, when Phillips met with Petitioner Williams again to discuss his status. (*Id.*, AHT 138-139). Phillips reiterated to Petitioner Williams some 10 to 11 times during the meeting that he could stay on active status with Respondents if he could just pay down his debt. (*Id.*, AHT 137). During the January 12, 1994, meeting, Phillips informed Petitioner Williams that the three options were no longer available to him and that Respondents were terminating their relationship because he had filed his charge . (*Id.*, AHT, Cl. Exh. 3 pp. 24, 26-27, 55-56, 60). The transcript of this meeting clearly demonstrates Phillips retaliatory intent:

Phillips: Well what do you want to do about this

discrimination thing? Do you want to escalate that still, or what do you want to do with this thing?

Williams: I'm not going to escalate it. It has a natural course of events.

Phillips: Okay. You want to just let it run its course of events?

Williams: I do not at this point plan to stop it.

Phillips: Okay. What I want you to do is, I want you to get all your stuff and move all your stuff out of the office, okay, ASAP.

(Emphasis added)(R. Vol. 5, AHT Cl. Exh. 3 pp. 55-56; R. Vol. 5, AHT 63-64).

Later in their meeting, Phillips tells Petitioner Williams to return his client files and all company property. (R. Vol. 5, AHT 63-64). When Plaintiff objects because this would render him unable to service his clients as a broker or retired agent, Phillips indicates that Williams would be treated differently if he had not filed his EEOC charge:

Phillips: I'm just saying that that's the agreement that you signed. It's our property. That's property to us.

Williams: If you keep my client files--

Phillips: I didn't make the rules.

Williams: -- are you saying --

Phillips: I'm not the one that filed the charge. That was stupid of you to do that. All you did is just piss the shit out of me.

(Emphasis added) (R. Vol. 5, AHT 63-64, and R. Vol. 5, AHT Cl. Exh. 3 p. 60).

Phillips eventually tells Williams that he would not be kicked out of the office, divested of his client files and the means

to service his clients, and deprived of the valuable economic options he had to continue working with Cigna if he had just not filed his charge:

Williams:	Is there any way that I could have my phone calls forwarded?
Phillips:	Sure. I mean, we'll give your number.
Williams:	You will give whoever calls my number. Okay. All right.
Phillips:	We'll do everything we can to help you, Arthur. I just for the life of me, I cannot understand why you would go down there and file that suit and put yourself through this.
Williams:	Larry --
Phillips:	Because you wouldn't have gone through this if you wouldn't have filed that suit.

(Emphasis added)(R. Vol. 5, AHT Cl. Exh. 3 p. 60).

In addition to the three references set forth above, the transcript of the meeting shows that Phillips first raised and continued to refer to Williams' EEOC Charge several other times during the meeting. (R. Vol. 5, Cl. Exh. 3 pp. 8, 10, 60, 63, 71-73). The transcript also shows that Phillips admitted to Petitioner Williams during the January 12, 1994, meeting, that a younger co-worker in the same position, Jeffrey Rothschild, was having similar problems, but instead of being given the same options as Petitioner, Respondents had only placed Rothschild on a performance improvement plan. (R. Vol. 5, AHT Cl. Exh. 3, p. 12). Phillips admitted at the arbitration hearing that the tape recording and transcript of the January 12, 1994, meeting were accurate and that he had in fact made these statements in their meeting. (R. Vol. 5, AHT 411-12).

During the arbitration proceeding, Petitioner served nine

separate pro-se document requests on Respondents in the arbitration proceeding to obtain records necessary to challenge Respondents' performance and loan figures, to obtain comparative evidence regarding his co-workers' performance and loan balances, and to obtain information regarding any other similar age discrimination and retaliation claims made against Respondents. (R. Vol. 5, MTV, Exh. 1, ¶¶4-5, and Exh. 1(B); R. Vol. 4, 762-63). Respondents failed or refused to comply with NASD rules which require a party to respond or object within 30 days of such discovery requests. (*Id.*, and Exh. 4, p. 2). Petitioner filed a motion with the arbitrators to compel production of these critical comparative records. (*Id.*). Respondents moved for a continuance of the arbitration hearing, to which Petitioner agreed. (R. Vol. V, MTV, Exh. 1(B)). When the hearing was reset for October 15, 1996, and after Petitioner obtained new counsel, Petitioner moved to continue the hearing date due to a pre-existing scheduling conflict so that the parties could complete discovery and properly prepare for the hearing. (*Id.*). Prior to the arbitration hearing, on October 10, 1997, Respondents notified the arbitration panel of their agreement to Petitioner's continuance request, if the arbitrators would stay all discovery until after January 6, 1997, a condition to which Petitioner agreed. (R. Vol. 5, MTV Exh. 1, Exh. 4, Exh. 4(C) AHT 10, and Exh. 4(D), letters of 9/16/96, 9/23/96 and 10/12/96). The arbitrators denied Petitioners' agreed motion for continuance and his motion to compel and proceeded with the hearing on October 15-17, 1996, explaining that they felt like arbitration should be an expedited procedure and that the agreed continuance was "unconscionable" and "unfair to the parties," apparently despite their agreement to it. (R. Vol. 5, MTV, AHT 7-22). Consequently, Petitioner's lead counsel was not available for the hearing due to scheduling conflicts and the attorney that actually represented Petitioner at the hearing admitted that he had only met Petitioner the day prior to the hearing. (*Id*). The arbitration hearing proceeded, however, after having been denied access to relevant comparative evidence and performance records, Petitioner was prejudiced in his ability

to attack Respondents' assertions, although he was still able to obtain the admissions discussed above.

The arbitrators award summarizes the parties' claims, but is silent as to the arbitrators' actual factual findings or legal analysis of the evidence presented at the hearing. (App. pp. 54-61). It does not appear from their comments in the arbitration record that they were cognizant of or considered placing any heightened evidentiary burden on Respondents due to the Petitioner's presentation of direct evidence of retaliatory intent by Petitioner's supervisor in the meeting at which the supervisor actually terminated all of Petitioner's options. (*Id.*, and R. Vol. 5, AHT). The record shows that none of the three arbitrators had any training or experience in resolving statutory discrimination claims, and that two of the three arbitrators had absolutely no legal training and no experience with labor or employment disputes. (R. Vol. 6, Def. Exh. 20). The arbitration award ultimately held Williams liable to Respondent Connecticut General Life Insurance Co. on its counter-claim related to the loan repayment in the amount of $18,945.00, and generally denied relief to both parties on all other claims with prejudice. (App. p. 59-60). The award assessed Petitioner $3,150 in forum fees to pay for the arbitrators' services. (App. p. 60-61).

The parties filed cross motions with the district court, Respondents seeking to enforce the award, and Petitioner seeking to vacate the award and lift the stay. This time, the district court rejected the review standards suggested by Petitioner, and applied an "extreme deference" standard, and found that under this standard, refused to vacate the award, and entered judgment for Respondents. (App. p. 62-70). The Fifth Circuit reversed the district court on the proper standard of review finding that an award can be set aside if the arbitrators manifestly disregarded the law, but found that Petitioner's showing had not met that standard. (App. p. 1-30).

REASONS FOR GRANTING THIS WRIT

1. The lower courts herein erred in failing to find that Respondents failed to meet their burden to establish that the arbitration agreement upon which they relied to obtain a stay of this litigation and ultimately enforcement of an arbitration award which did not properly enforce Petitioner's rights under the ADEA was appropriate, knowing, voluntary, or met any other pre-conditions to enforcement required by text, legislative history, and purpose of ADEA, as amended by the OWBPA and §118 of the 1991 CRA, and by failing to find the parties' agreement was excluded from the FAA's coverage.

This case presents the Court with an excellent vehicle for resolution of the questions left unanswered in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed.2d 26 (1991), and the considerable confusion and sharp division among the circuit courts concerning the proper standard of review of agreements to arbitrate statutory discrimination claims to determine whether to recognize and enforce such agreements, and as discussed in point 2 the standard of review to be applied to determine whether to enforce resulting awards, and to provide the lower courts much needed guidance on the proper application of those standards. This case contains a complete record, including the full arbitration hearing transcript, pleadings and rulings, the applicable NASD rules and arbitration code, and the policies of most arbitration providers, and raises virtually every issue currently causing division among the lower courts.

Congress passed the Older Workers Benefit Protection Act amendments to the ADEA in 1990. Pub. L. 101-433, which was codified as 29 U.S.C. 626(f). These amendments provide that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary," and go on to set specific criteria that the party seeking to enforce the claimed waiver must meet before the district court has statutory authority to enforce any waiver of ADEA created rights. The Fifth Circuit rejected Petitioner's argument that the Representative's

Agreement and the incorporated U-4 registration forms were not a knowing and voluntary waiver of his right to a judicial forum or jury trial under the ADEA, as amended by the OWBPA. (App. p. 35-42). Petitioner again asserted that he could not and did not knowingly or voluntarily waive his statutory rights to proper enforcement of the statute in a fundamentally fair forum, however the Fifth Circuit rejected the heightened standards for review of arbitration awards suggested by Petitioner and instead chose to limit its review authority to the "manifest disregard of the law" standard, which falls far short of proper enforcement of the ADEA and OWBPA amendments on this record. (App. p. 9-21). The record is devoid of any proof that the arbitration agreements relied upon by Respondents in support of its waiver argument, which is in the nature of an affirmative defense to Petitioner's ADEA lawsuit, ever met the OWBPA statutory criteria for a waiver of any of Petitioner's statutory rights or claims under the ADEA, including the right to jury trial or judicial determination, and/or his substantive and procedural rights under the ADEA.

The decisions of the Fifth Circuit are directly contrary to the statute, and its legislative history and intent. *Id.* Section 118 of the Civil Rights Act of 1991, states that the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal Law amended by this title, amending ... Section 626 of Title 29, Labor," upon the condition set by the preceding phrase "where appropriate and to the extent authorized by law." Pub.L. 102-166, set forth as a note to 42 U.S.C. §1981. The Fifth Circuits decisions are directly contrary to the text of the Act.

The Fifth Circuit's decisions rejecting Petitioner's continuing objections to Respondent's failure to establish that the parties' agreement and incorporated U-4 registration forms was knowing or voluntary, or met any statutory criteria for a waiver of rights required by the ADEA, as amended by the OWBPA and the Civil Rights Act of 1991, 29 U.S.c. §626(f), and is also directly

contrary to the interpretation of those provisions in *Oubre v. Entergy Operations, Inc*, 118 S. Ct. 838, 841-842 (1998)(noting that "the statutory command is clear" that any waiver of rights or claims under the ADEA must satisfy the OWBPA requirements). This Court explained:

> "The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its work. Congress imposed specific duties on employers who seek releases of certain claims created by the statute. Congress delineated these duties with precision and without qualification: An employee 'may not waive' and ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications."

Id. The OWBPA amendments to the ADEA "incorporates no exceptions or qualifications" for waivers or releases of any rights or claims under the ADEA based on whether the waiver or release is sought in a post-termination severance package or a pre-dispute arbitration agreement.

The Petitioner in *Gilmer* did not assert that the text or legislative history of the ADEA precludes waivers or releases of his ADEA rights and claims in an arbitration agreement, or any other vehicle, unlike Petitioner Williams herein. Despite the clear language of the text of the Act and this Court's strong pronouncement in *Oubre* concerning its meaning, the Fifth Circuit

in this case (App. p. 38-41), and several other circuit courts have found that the OWBPA amendments simply do not preclude enforcement of unknowing or involuntary waivers or releases obtained through mandatory arbitration agreements in violation of the OWBPA amendments to the ADEA. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith,* 170 F.3d 1, 4 and 12-13 (1st Cir. 1999)("We hold that Congress did not intend to preclude pre-dispute arbitration agreements when it enacted the OWBPA"); *Seus v. John Nuveen & Co.,* 146 F.3d 175, 181 (3d Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S. Ct. 1028, 143 L. Ed.2d 38 (1999).

These decisions are also in conflict the decisions of the Ninth Circuit in *Prudential Insurance Co. of Am. v. Lai,* 42 F.3d 1299, 1305 (9th Cir. 1994), and *Renteria v. Prudential Ins. Co. of Am.,* 113 F.3d 1104, 1105-06 (9th Cir. 1997), requiring waivers of statutory discrimination rights to be "knowing and voluntary." The Ninth Circuit's rulings are consistent with this Court's statements in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 52 n.15, 94 S. Ct. 1011 (1974), that "in determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent ... was voluntary and knowing."[5] The Ninth Circuit has described this standard as a heightened one. *Renteria,* 113 F.3d at 1105; *Lai,* 42 F.3d at 1305. The Third and Eight Circuits have rejected any heightened standard. Seus, 146 F.3d at 183-84 & n.2; *Patterson v. Tenet Health Care, Inc.,* 113 F.3d 832, 837 (8th Cir. 1997). The First and Seventh Circuits have recognized the issue, but have to date avoiding resolving it. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith,* 170 F.3d 1, 18 (1st Cir. 1999); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997).

In *Wright v. Universal Maritime Service Corporation,* 119

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[5]*See Also, Wright v. Universal Maritime Service Corporation,* 119 S. Ct. 391, 396-97 (1998), recognizing that "the right to a federal judicial forum is of sufficient importance to be protected" and that any waiver of that right must be "clear and unmistakable."

S. Ct. 391, 397 n.2 (1998), this Court interpreted the language of §118 of the 1991 Civil Rights Act amendments to Title VII and the ADEA, at least in the collective bargaining agreement context, to bar enforcement of waivers which are not "appropriate," stating "[o]ur conclusion that a union waiver of employee rights to a federal judicial forum for employment discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not 'appropriate' ... to find an agreement to arbitrate." In *Rosenberg*, despite rejecting the OWBPA argument, the First Circuit did, however, invalidate an arbitration agreement and vacated the award in that case because the employer failed to prove compliance with the standard set forth in the §118 amendment authorizing use of arbitration only "where appropriate and to the extent authorized by law." *Rosenberg*, 170 F.3d at 4, 19-21. As noted by the First Circuit in Rosenberg, "[g]iven Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where "appropriate," a concern not expressed in the FAA or at common law, Merrill Lynch [the employer] should, we believe, bear that risk." 170 F.3d at 19 & n.16 (noting that this approach is also consistent with traditional contract law). *Accord, Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998). Cf., *Ramirez-De-Arellano v. Am. Airlines, Inc.*, 133 F.3d 89, 91 n.2 (1st Cir. 1997)(Finding waiver of right to judicial forum must at least be "express"); *Nelson v. Cyprus Bagdad Copper Corp.*, 199 F.3d 756, 761-762 (9th Cir. 1997)(same), *cert. denied*, __ U.S. _ , 118 S. Ct. 1511, 140 L. Ed. 2d 665 (1998). The Third Circuit has clearly rejected this interpretation of the "appropriate" language in the §118 amendments. *Seus*, 146 F.3d at 183. So has the Seventh Circuit. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir. 1999).

In Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1193-94 (9th Cir. 1998), the Ninth Circuit extended the debate and took the position contrary to the decisions rendered in all other circuits to date, after examining the legislative history, context and text of the Civil Rights Act of 1991 amendments to

the ADEA and Title VII, that Congress intended to preclude compulsory arbitration of these statutory claims altogether. Cf., *Koveleskie*, 167 F.3d at 365; Seus, 146 F.3d at 183. *Accord, Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). Petitioner Williams in reliance upon the D.C. Circuit's decision in *Cole v. Burns Int'l. Sec. Servs.*, 105 F.3d 1465, 1481-85 (D.C. Cir. 1997), also objected to enforcement of the arbitration agreement herein on grounds that it required him to pay the arbitrators' fees (forum fees) in violation of text, purpose and legislative history of the ADEA, as amended. In *Cole*, the D.C. Circuit construed an arbitration agreement to be consistent with and therefore enforceable under *Gilmer*, only after reforming the parties' agreement to require that the employer pay all arbitrator or forum fees and expenses, reasoning that "there is no reason to think that the Court would have approved arbitration in the absence of this arrangement." 105 F.3d at 1484.[6] A system which imposes greater fees to participate than the judicial system otherwise available to employees to enforce their ADEA rights is not "appropriate" because it deters full access and vigorous enforcement of the statute, and therefore inconsistent with the text, purpose and legislative history of the Act. *Id.*, at 1485. The Fifth Circuit in this case clearly rejected the view taken by the D.C. Circuit in Cole, finding instead that whether this requirement was

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[6]The court in *Cole* reasoned further that "Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." *Id.*

"appropriate" depended on the reasonableness of the fee and the ability of the employee to pay it. (App. p. 23-27). The First Circuit has also rejected the *Cole* view on this issue. *Rosenberg*, 107 F.3d at 16. The Tenth Circuit recently addressed this issue in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1233-35 (10th Cir. 1999), and agreed with the D.C. Circuit that, in part because the employee could not afford the arbitration fees, that the agreement undermined "the remedial and deterrent functions of the federal anti-discrimination laws." The Eleventh Circuit agreed finding that the required $2,000 fees "a legitimate basis for a conclusion that the clause does not comport with statutory policy." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).

Petitioner Williams also objected to enforcement on grounds that the arbitration agreement was not within the scope of Section 2 of the Federal Arbitration Act (FAA) because it was not a contract "evidencing a transaction involving commerce," and that employment contracts were specifically excluded by the text of Section 1 of the FAA. 9 U.S.C. §§1-2. The Fifth Circuit rejected Petitioner's arguments. (App. p. 36-38). The Ninth Circuit recently studied the issue and opined that both the text and legislative history of 9 U.S.C. §§1-2 confirm Congress' intent, at the time of passage, to exclude all employment contracts from coverage. *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998), as amended, 99 Cal. Daily Op. Service 3974, 79 Fair. Emp. Prac. Cas. (BNA) 1508, 161 LRRM (BNA) 2403 (May 27, 1999). Most circuits have rejected this view.[7] Several circuits

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[7]*See, e.g., Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Rojas v. TK Comm., Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356-58 (7th Cir.), *cert. denied*, 522 U.S. 912, 118 S. Ct. 295 (1997); *Cole*, 105 F.3d at 1470-72.

have issued conflicting opinions.[8] The *Craft* decision also appears to be at odds with this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).[9] Although none of this Court's decisions have directly addressed whether Congress intended to exclude all contracts of employment as suggested by the FAA's legislative history.[10] *See, e.g., Craft*, 177 F.3d at 1089-91 (discussing legislative history).

This case provides the Court with an excellent vehicle to resolve these issues left open in *Gilmer* and provide greatly needed assistance to the lower courts on the standard of review to be applied to determine whether to recognize and enforce agreements to arbitrate statutory discrimination claims, and the manner in which this Court expects that standard to be applied.

2. The lower courts herein erred in failing to adopt and apply the proper standard of review for lower courts to apply to

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[8]*Cf. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, Inc., 7 F.3d 1110, 1120 (3d Cir. 1993) to *Tenney Eng'g, Inc. v. United Elec. Workers Local 437*, 207 F.2d 450, 452-53 (3d Cir. 1953); *Cf. O"Neill v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) to *Domino Sugar Corp. v. Sugar Workers Local Union No. 392*, 10 F.3d 1064, 1067-68 (4th Cir. 1993); and, *Cf. McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) to *United Food Workers Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989).

[9]*Cf., Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200-01 (1956). *But See. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 77 S. Ct. 912, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957); *General Elec. Co. v. United Elec. Workers*, 353 U.S. 547, 548, 77 S. Ct. 921 (1957); *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 40 n.9, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

[10]Petitioner suggests the ADEA amendments and the FAA can also be consistently interpreted if the revocation clause of Section 2 of the FAA ("save upon such grounds as exist at law or in equity for the revocation of any contract" is construed to mean an arbitration agreement inconsistent with the OWBPA amendments and §118 of the 1991 CRA is subject to revocation). This would allow the Court to exclude non-complying agreements to arbitrate statutory civil rights claims without disturbing the growing jurisprudence enforcing such commercial contracts.

challenges to mandatory arbitration decisions involving statutory discrimination claims, in this case, brought under the ADEA, and instead adopting and applying a standard of review which is contrary to the text, legislative history and purpose of the ADEA, as amended by the OWBPA and §118 of the 1991 CRA, this Court's decisions, and the decisions of other circuit courts of appeal.

While the Fifth Circuit agreed with Petitioner that the district court's review of an arbitration award of a statutory discrimination claim was not limited to the four corners of the Federal Arbitration Act, and thus, could be vacated where the award was in manifest disregard of the law,[11] Petitioner had also requested that the Fifth Circuit hold that a district court should not defer to or enforce an arbitration award involving the very same issues presented by a statutory discrimination claim before the court, unless the lower court determined (1) that "the arbitrator's decision is in no way violative of the private rights guaranteed by [the discrimination statute], nor of the public policy which inheres in [it]" (2) that "the evidence presented at the arbitral hearing dealt adequately with all factual issues," (3) that "the arbitrator actually decided the factual issues presented to the court" in the discrimination claims, (4) that "the arbitration proceeding was fair and regular and free of procedural infirmities," (5) the "adequacy of the record" with respect to the issue of discrimination[12], and (6)

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[11]Correct application of the manifest disregard of law standard requires, at a minimum, that the reviewing court itself must correctly understand and interpret the law which is the subject of the challenge that it was manifestly disregarded by the arbitrator. In this case, the Fifth Circuit's decision evinces that it held Petitioner to a higher standard in proving that he was subjected to an "adverse employment action" than is required under the ADEA's anti-retaliation provision. The reviewing court cannot measure the conduct of the arbitrator (whether he/she manifestly disregarded the law) against an incorrect interpretation of that very same law.

[12]This would include a written opinion by the arbitrators which adequately sets forth their factual findings, conclusions, and rationale for their determination of the statutory claim, sufficient to allow meaningful judicial

ensure the "special competence of particular arbitrators" to make this determination.[13] The Fifth Circuit's decision, while a step in the right direction, does not go far enough to adequately protect the statutory rights of employment discrimination victims. In light of the recent direction of jurisprudence validating individual agreements to arbitrate involving statutory employment discrimination claims since *Gilmer*, Petitioner Williams urges this Honorable Court to adopt and apply these well-reasoned standards to govern a district court's review of individual employee arbitration awards to determine whether to defer to and/or enforce such an award where to do so would preclude the employee from bringing a proceeding in federal court to enforce his rights under the employment discrimination statute (here, the ADEA) and instead substituting the arbitral award for an original judicial determination.

The *Alexander* Court held "We think it clear that there can be no prospective waiver of an employee's rights under Title VII." *Id.*, at 51. The Court stated further, "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id.*, at 47. Following *Alexander*, this Court took the position on several occasions that it did not consider collectively

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review to assure a fundamentally fair procedure and compliance with the statute, since the award is to be substituted for a judicial determination.

[13]While, admittedly, these review factors were developed by the Fifth Circuit in the context of determining whether to defer to a collective bargaining agreement grievance arbitration award involving a Title VII claim, the Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974), did not reject the wisdom of these review standards to protect the statutory rights of discrimination victims, but rather found it unnecessary at that point in history to adopt such stringent standards in the context of collective bargaining agreement grievance arbitration awards because of its primary holding that the collective bargaining agreement did not effect a waiver of the plaintiffs' right to proceed in federal court on his statutory claims.

negotiated arbitration to provide an adequate substitute for a judicial proceeding in protecting federal statutory and constitutional rights. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981); *McDonald v. City of W. Branch, Michigan*, 466 U.S. 284, 104 S Ct. 1799 (1984). In *Gilmer*, the Court, in the context of an individual agreement to arbitrate, marked a significant shift in the Court's view of the use of arbitration as a substitute for judicial proceedings, noting that the FAA evinced a strong federal policy encouraging the use of arbitration to resolve parties' disputes, and that this applied even to statutory employment discrimination claims that were the subject of the individually negotiated arbitration agreement. In *Wright v. Universal Maritime Servs. Corp.*, 119 S. Ct. 391 (1998), the Court took the debate a step further by holding that with appropriate safeguards, even a collectively negotiated arbitration agreement may yield an adequate arbitral substitute for judicial proceedings.

The shift in this Court's position towards the use of arbitration as a substitute to the federal judiciary resolving federal statutory claims has caused strong division and confusion among the circuit courts. *See, e.g., Cole*, 1486-1487; *Halligan v. Piper Jaffrey, Inc.*, 148 F.3d 197, 201-04 (2d Cir. 1998); *Dirussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821-27 (2d Cir. 1997); *Kiernan v. Piper Jaffrey Co., Inc.*, 137 F.3d 588, 593 (8th Cir. 1998).[14] (App. p. 18-19).

This Court's decisions have largely focused on the front-end of the question, i.e., whether the agreement to arbitrate is enforceable, rather than the question presented here, once the case is sent to arbitration pursuant to such an agreement, what is the proper standard of review of the arbitral award to be applied by

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[14]*See Also, Desiderio v. National Ass'n of Sec. Dealers*, 191 F.3d 198, 203 (2d Cir. 1999); *Seus*, 146 F.3d at 183; *Patterson*, 113 F.3d at 838; *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812-13 (4th Cir. 1999); *Prudential*, 42 F.3d at 1305; *Duffield*, 144 F.3d at 1200; *Shankle*, 163 F.3d at 1234; *Paladino*, 134 F.3d at 1062; *Gardner v. Benefits Communication Corp.*, 175 F.3d 155 (D.C. Cir. 1999).

the lower courts to determine whether the arbitral proceeding truly constituted a fair and adequate substitute for full enforcement of the statutory rights and remedies of the employee. In none of the Court's prior decisions has the Court ever held that anything less than full and proper enforcement of the anti-discrimination statutes was acceptable when determining whether to substitute the arbitral award for the decision of federal courts expressly authorized by the statute to ensure proper enforcement. As recognized by the Fifth Circuit in its second opinion in the matter (App. p. 13-14, 17-18), this Court in *Gilmer* reiterated that "by agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by statute; instead it only submits their resolution in an arbitral rather than judicial forum. ... So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 500 U.S. at 25-27, 111 S.-Ct. at 1652-54, quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 625, 637 (1985).[15] This Court has also stated that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.*, at 32, n.4 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)). However, the review standard crafted by the Fifth Circuit fell short of doing so.

The Court approved review of arbitrator's awards in commercial arbitrations under the manifest disregard of law standard in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 115 S. Ct. 1920, 131 L .Ed. 2d 985 (1995). This Court has not adopted the use of that review standard for arbitration decisions of statutory employment discrimination claims, or

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[15] *Cf. McDonald*, 464 U.S. At 290, holding, in the context of arbitration of a claim brought under 42 U.S.C. §1983, that "according preclusive effect to an arbitration award in a subsequent §1983 action would undermine that statute's efficacy in protecting federal rights."

indicated that it sufficiently protects claimants' statutory rights. Under the formulation of the manifest disregard of law standard of review applied by the Fifth Circuit in this case, only where it is "manifest that the arbitrators acted contrary to the applicable law" and upholding the award would result in "significant injustice" should the arbitration award, even if it fails to properly enforce the statute, be vacated. (App. p. 21-22).

As noted by the Fifth Circuit, the circuit courts interpretations and application of the "manifest disregard of law" review standard have varied.[16] (App., p. 21, 28-29, n.2). Under

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[16]For example, in the First Circuit this standard is met "where it is clear from the record that the arbitrator recognized the applicable law and then ignored it," but also noting that the challenger must show the award is "(1) unfounded in reason and fact; (2) *based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling;* or (3) mistakenly based on a crucial assumption that is concededly a non-fact." (emphasis added). *Advest Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990). The Second Circuit has found that "the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it," which it construes as meaning that *"[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."* (emphasis added). *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997)(arbitrator found violation of ADEA and awarded plaintiff $200,000, but denied claim for attorneys fees in its entirety, even though arbitrator's decision evinced ignorance of governing legal principles including the ADEA's mandate of attorney's fees). In the Sixth Circuit, "an arbitration panel does not act in manifest disregard of the law unless (1) *the applicable legal principle is clearly defined and not subject to reasonable debate;* and (2) the arbitrators refused to heed that legal principle." (emphasis added). *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). In the Seventh Circuit, "there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators *deliberately* disregarded what they knew to be the law in order to reach the result they did." (emphasis added). *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

all of the existing circuit court variations of this standard, even if a majority of this Court would agree that the arbitrators failed to properly enforce the discrimination statute in question, the award would be enforced unless the record demonstrated that the arbitrator recognized or appreciated the existence of a clearly governing legal principle, and then ignored it. This standard effectively leaves enforcement of these important statutory rights in the hands of arbitrators with no standards in place to assure that they even know what the law is, let alone properly apply it. Limiting lower court's ability to review arbitration awards involving statutory discrimination claims to determining whether the arbitrator acted in "manifest disregard of law", particularly as applied by the Fifth Circuit, will require federal courts to enforce arbitration awards that are admittedly contrary to the language, purpose, meaning and intent of the discrimination statute, and require persons that Congress intended to protect to suffer the consequences of illegal discrimination while forgoing their right to have the discrimination statute properly enforced.

Petitioner Williams urges that substitute an arbitral award for an original decision by a federal court that fully and properly enforces all parties' statutory rights is not proper unless the party seeking to substitute an arbitral award for an original decision by a federal court that fully and properly enforces all parties' statutory rights establishes that the opposing party knowingly, voluntarily and expressly agreed to accept this less than full level of review and enforcement of his or her statutory rights and remedies. This is also consistent with the waiver standard established in *Wright*[17] and this Court's interpretation of the ADEA waiver protections set forth in 29 U.S.C. §626(f) in *Oubre*. Petitioner suggests that where such a showing is made, however,

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[17]Noting that a mere agreement to submit a statutory claim to arbitration is not a waiver of this right to obtain full compliance with the statute's requirements. 119 S. Ct. at 396 (noting that to effect a waiver of statutory rights, the arbitration contract must make "compliance with the ADA a contractual commitment that would be subject to the arbitration clause.").

the individual is bound by the express terms of his bargain.[18] But where the party seeking to substitute the arbitral award has not established that there was a truly knowing, voluntary and express waiver of the right to have the statute properly enforced,[19] such as

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[18]While this would be true in a case involving an individual agreement to arbitrate which was truly knowing and voluntary, Petitioner would suggest that in a situation involving a collectively negotiated waiver, where a clear and unmistakable knowing and voluntary individual waiver was found, that due to the ability of the union to compromise a union members grievance where it is in the best interest of the union to do so, conduct which has traditionally been held not to violate the duty of fair representation (*See, e.g.*, the discussion of this concern in *Barrentine*, 450 U.S. at 742-743, 101 S. Ct. at 1445-1446), that review of collective bargaining agreement arbitration awards would still be subject to application of the deferral factors advocated by Petitioner to ensure that the arbitration award truly is a fair and adequate substitute that properly enforces the parties' rights under the statute.

[19]Petitioner Williams has consistently maintained, as demonstrated by his opposition to Cigna's first appeal to the Fifth Circuit, that he has never knowingly, voluntarily or expressly waived his right to full and proper enforcement of the ADEA. The Fifth Circuit in its first decision in this case, *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995) (See, discussion in Section IV-V of the opinion), clearly noted Williams continued objection on this ground. However, the Fifth Circuit incorrectly assigned the burden of proving that the waiver was knowing, voluntary, and express on *Williams* instead of Cigna, who was the party seeking judicial enforcement of the waiver (arbitration) agreement. *Cf., Lai v. Prudential Ins. Co.*, 42 F.3d 1299, 1304-1305 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997). The record is devoid of any proof ever offered by Cigna which establishes that it explained to *Williams* that his signature of the U-4 would constitute a waiver of his right to have the ADEA properly enforced by the Federal Courts. It is also some evidence of the lack of any "meeting of the minds" by the parties on the meaning of this agreement that Cigna did not realize the effect of the agreement to comply with NASD rules on the arbitrability of this dispute as shown by its failure to timely assert this claim until after it had removed *Williams'* action to federal court, had answered and asserted a counter-claim seeking the assistance of that court to obtain affirmative relief against *Williams*, and exchanged discovery, all in apparent violation of the very same waiver/arbitration agreement that it is seeking

here, if such an award is enforceable at all as discussed in the first point above, a court should not enforce the award unless it determines that deferral is "appropriate"[20] after considering these six factors to ensure that the award is a fair and adequate substitute for a court decision properly enforcing the statute.

This case provides the Court with the opportunity to provide guidance to lower courts on the standard of review to be applied to determine whether to enforce arbitral awards of statutory discrimination claims, and the manner in which that standard should be applied.

3.The lower courts herein erred in finding that Petitioner was not retaliated against by Respondents when they denied him significant opportunities for continued employment in a lesser

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to enforce. *Id.*

[20]Six months after *Gilmer*, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which had as one of its primary goals "to strengthen Title VII by making it easier to bring and prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination." Section 118 of that Act provides that "***Where appropriate and to the extent authorized by law***, the use of alternative means of dispute resolution, ... including arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title." (emphasis added). There is nothing in the Congressional history of this enactment supporting any view that Congress would or did actually think that anything less than the full and proper enforcement of plaintiffs statutory rights and remedies in a fundamentally fair proceeding was "appropriate." *See, e.g., Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1191-1195 (9th Cir. 1998). While *Duffield* examined the effect of Section 118 of the Civil Rights Act of 1991 in the context of a Title VII claim, Section 115 of said Act also amended provisions of the ADEA, and thus, presumably Congressional intent regarding arbitration of claims brought under the civil rights statutes in Section 118 should be equally applicable to claims brought under the ADEA.

role with their organizations because he filed a charge of discrimination with the EEOC and in finding that he had not suffered an "adverse employment action" in a manner contrary to the text, legislative history, and purpose of the ADEA, this Court's prior decisions, and the decisions of circuit courts of appeal.

Once the Fifth Circuit determined the appropriate standard of review to be applied, it turned to the actual application of the manifest disregard of law review standard to the arbitration award in the instant case. The Fifth Circuit's conclusion that a reasonable arbitrator could have found that Williams did not suffer "an adverse employment action" and that any disadvantage he suffered was not causally related to his EEOC claim (App. p. 22-23), is directly contrary to the evidence in the record, and strongly suggests that in determining whether actionable retaliation was present, the Fifth Circuit viewed the "adverse employment action" requirement in a manner contrary to the text and purpose of the ADEA anti-retaliation provision. 29 U.S.C. §623(d).

The record demonstrates, as the Fifth Circuit noted, that Cigna advised Williams that it was terminating his employment status as an active agent due to non-performance, **unless** Williams (1) immediately paid the debt in which case he would remain an active agent, (2) be moved to retired agent status, which is a more limited form of revenue-producing agency authority, or (3) be moved to broker status, which is a differently limited form of revenue-producing agency authority. The finding that Williams rejected the offer by not accepting by the arbitrary January 1, 1994, deadline is contrary to the record which shows that Respondents did not consider him terminated when the deadline passed and instead continued to let him work as an active agent at its office. (R. Vol. 5, AHT). The record is also clear that his supervisor did not finally revoke all authority, withdraw all options for continued service, and make Williams leave the premises until the conversations on January 12, 1994, about Williams' EEOC charge in which the supervisor's retaliatory

comments were made. (R. Vol. 5, Cl. Exh. 3). It is only after Williams refuses to withdraw his EEOC charge that Phillips revokes all options and cites Williams' refusal as the reason for his change in treatment. (*Id.*). The adverse employment action suffered by Williams was the denial of the options of continuing service for Cigna either as a retired agent or a broker, or even as an active agent if he had chosen to immediately pay off the debt, in retaliation for Williams filing his EEOC charge, all of which have great economic worth to Williams.

The Fifth Circuit's characterized Cigna management official Phillips' clearly retaliatory remarks to Williams as "after the fact remarks" which did not "evince retaliatory motive or action" and instead viewed Phillips' retaliatory demand to Williams to drop his EEOC Charge, which Phillips subsequently carried out by terminating Williams' remaining options to continue service with Cigna when Williams refused to comply with this illegal request, as nothing more than "overtures of compromise or settlement," or "reasonable defensive measures." (App. p. 29-30, fn 4). The Fifth Circuit's comments plainly indicate that it does not consider the particular adversity to which Williams was subjected because he filed his EEOC charge to constitute an "adverse employment action" as that court has defined that term in prior holdings. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997)(conduct must rise to the level of an "ultimate employment action" in order to be actionable). *Accord, Burger v. Central Apartment Management, Inc.*, 168 F.3d 875 (5th Cir. 1999); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995).

The Fifth Circuit's view[21] of what constitutes an actionable illegal "adverse employment action" for purposes of

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[21]The Eighth Circuit has also agreed with and adopted the Fifth Circuit's "ultimate employment action" test. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

establishing retaliation under the ADEA, and Title VII, is erroneous and in conflict with considered decisions of the First, Ninth, Tenth, Eleventh, and D.C. Circuits.[22]

Additionally, the arbitrators and reviewing courts failed to place a heightened burden of proof on Respondents even though Petitioner Williams' presented direct evidence of retaliatory intent by the decision maker in the actual termination meeting. This conduct is contrary to this Court's and many Circuit Court decisions holding that once the plaintiff establishes by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.[23] Although there may be evidence that Respondents had initiated procedures, or may have even actually decided, to terminate Petitioner's employment status from that of active agent because of his debt in December 1993, this does not refute the Petitioner's direct evidence proving that Respondents thereafter withdrew significant valuable employment opportunities to continue working for Respondents in a more limited role as a broker or as a retired agent, or even to

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[22]*Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998); *Passer v. Am. Chem. Society*, 935 F.2d 322, 331 (D.C. Cir. 1991).

[23]*Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 and 1798-99, 104 L. Ed. 2d 268 (1989)(plurality op. and O'Connor, J., concurring); *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). *Accord, e.g., Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525 (11th Cir. 1985); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 870 (11th Cir. 1985); *Grant v. Hazlett Strip Casting Corp.*, 880 F.2d 1564, 50 FEP Cases (BNA) 622, 626 (2d Cir. 1989); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 658 (7th Cir. 1991)(*en banc*). As pointed out in the briefing below, the Fifth Circuit had previously followed this rule. *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990).

keep his current job if he paid down the debt **because** he filed his EEOC charge. *Id.*

The Respondents position at arbitration that once it decided to terminate Petitioner's status as an active agent it was then a "legal impossibility" to retaliate against him (R. Vol. 5, AHT 35-36), of which the arbitrators took note in their award (App. p.57), is contrary to this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), and in this case the record is clear that instead of terminating him outright, Respondents offered him opportunities to continue employment in a more restricted role or even in the same role if he paid down his debt. (*Id.*, AHT 395-396, 388-390, 406-407). At its basic core, the record shows that Respondents were willing to work with Petitioner on reducing his debt load and to continue to employ him in various capacities, and then upon learning of his EEOC charge, they were not; this difference in treatment is the essence of prohibited retaliation under the ADEA. 29 U.S.C. §623(d).

The Fifth Circuit's conclusion that a "reasonable arbitrator" could view Respondent's blatantly retaliatory conduct as "overtures of compromise or settlement of the ADEA claims" is also directly contrary to the Older Workers Benefit Protection Act (OWBPA) amendments to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §626(f)(1), and this Court's interpretation of these provisions in *Oubre v. Entergy Operations, Inc*, 118 S. Ct. 838, 841-42 (1998). If, as the Fifth Circuit incorrectly found, Cigna actually carried out its threatened termination of Williams effective January 1, 1994 (despite continuing to allow him to work on behalf of their clients for two weeks after that "threatened" deadline, and not making him stop these activities on their behalf until after the retaliatory confrontation about his charge), and that the revocation of all previously offered options to continue service with Respondents when Petitioner refused to withdraw his EEOC charge can be construed as "overtures of compromise or settlement," then Respondents' conduct in making such a severance offer would clearly and directly violate the OWBPA amendments to the

ADEA which require such an offer (to withdraw or release rights or claims under the ADEA in exchange for financial consideration or for continued employment opportunities, as here) to be knowing, voluntary, written, explained with specific references to particular ADEA/OWBPA rights, provide for a 21 day review period and a 7 day revocation period, among other statutory requirements. 29 U.S.C. 626(f)(1).

This Court should seize the opportunity to require the lower court on remand to reject the developing ultimate employment action doctrine and to apply a proper definition of "adverse employment action" consistent with the statutory anti-retaliation provisions of the ADEA when determining whether Respondents' conduct constituted prohibited retaliation in violation of the ADEA, and thereby, resolve a serious conflict between the Circuits which has, is and will continue, to harm legitimate victims of illegal retaliation.

CONCLUSION

The Court should grant *certiorari* to review this very important matter and reverse the opinions of the United States Court of Appeals for the Fifth Federal Circuit which are contrary to the text, purpose, and legislative history of the ADEA, as amended by the OWBPA and Section 118 of the 1991 Civil Rights Act, and the text, purpose and legislative history of the FAA, and provide guidance to the badly divided lower courts concerning the proper standard of review of agreements to arbitrate statutory discrimination claims to determine whether to recognize and enforce such agreements, and the standard of review to be applied to determine whether to enforce resulting awards, and the scope and meaning of the ADEA's anti-retaliation provision, and to provide the lower courts guidance on the proper application of those standards.

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(Any footnotes trail end of each document)

No. 97-10985

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTHUR H WILLIAMS,
Plaintiff-Counter Defendant-Appellant,

v.

CIGNA FINANCIAL ADVISORS INCORPORATED;
CIGNA INDIVIDUAL FINANCIAL SERVICES;
Defendants-Appellees,

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendant-Counter Claimant-Appellee.

December 6, 1999, Decided

COUNSEL:
For ARTHUR H WILLIAMS, Plaintiff - Counter Defendant - Appellant: William Clayton Isbell, Law Office of William C. Isbell, Dallas, TX.

For CIGNA FINANCIAL ADVISORS INCORPORATED, CIGNA INDIVIDUAL FINANCIAL SERVICES, Defendants - Appellees: R Rogge Dunn, Matthews, Carlton, Stein, Shiels, Pearce, Dunn & Knott, Dallas, TX. James Bruce Herman, CIGNA Corporation, Philadelphia, PA.

For CONNECTICUT GENERAL LIFE INSURANCE COMPANY, Defendant - Counter Claimant - Appellee: R Rogge Dunn, Matthews, Carlton, Stein, Shiels, Pearce, Dunn & Knott, Dallas, TX. James Bruce Herman, CIGNA Corporation, Philadelphia, PA.

For AMERICAN ASSOCIATION OF RETIRED PERSONS, Amicus Curiae: Cathy M Ventrell- Monsees, American Association of Retired Persons, Washington, DC.

For NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, Amicus Curiae: Douglas A Hedin, Minneapolis, MN.

For NATIONAL EMPLOYEE RIGHTS INSTITUTE, Amicus Curiae: Paul H Tobias, Cincinnati, OH.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae: Geoffrey Lundeen Carter, Equal Emplyment Opportunity Commission, Office of the General Counsel, Washington, DC.

For EQUAL EMPLOYMENT ADVISORY COUNCIL, Amicus Curiae: Robert E Williams, Ann Elizabeth Reesman, McGuiness & Williams, Washington, DC.

JUDGES:
Before POLITZ, WIENER and DENNIS, Circuit Judges.

OPINIONBY:
DENNIS

OPINION:

DENNIS, Circuit Judge:

Arthur Williams appeals from the district court's judgment confirming an arbitration panel's award (1) rejecting his claims against defendants based on age discrimination and retaliation under the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C.* § § *621 et seq.*, and (2) granting defendants' counterclaim against Williams holding him liable for and ordering him to pay $ 18,945 in satisfaction of his unpaid promissory notes held by one of the defendants. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1987, Cigna Financial Advisors, Inc. (Cigna) hired Williams as a Registered Representative (agent) at the age of 58. As a condition of his employment, Williams registered with the National Association of Securities Dealers

(NASD). In doing so, he signed a Uniform Application For Securities Industry Registration or Transfer (U-4 Form) which provided that "any dispute, claim or controversy that may arise between me and my firm . . . is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." In 1993, Williams had the lowest sales of 15 similarly situated agents and owed Cigna $ 29,613 for advances on future commissions and a loan for the purchase of a computer.

Larry Phillips, Cigna assistant regional vice-president, and James Lasater, Cigna regional vice-president, met with Williams on December 22, 1993. They informed Williams that, because of his consistently unprofitable performance and growing indebtedness, he could not continue as an active agent, unless he immediately reduced his debt by $ 18,000. Otherwise, they said he must become a retired agent. The evidence is in dispute as to whether they offered Williams the option of becoming a broker instead of retiring.[1] Phillips encouraged Williams to sign a form changing his status to retired agent effective January 1, 1994. Phillips stated that if Williams failed to elect one of the options offered, he would be terminated. Williams said he was not willing to retire, and he did not accept any of the options offered. The evidence is in dispute as to whether Williams rejected the offers at that point or simply left the meeting without indicating whether he would accept any of them.

Williams filed a complaint with the Equal Employment Opportunity Commission (EEOC) on January 5, 1994, claiming that he had been discriminated against in violation of the ADEA. In his first complaint, Williams alleged that he was given the options of retiring or resigning during the December 22 meeting with Phillips and Lasater. When Phillips learned of the EEOC complaint he requested a meeting with Williams. Williams met with Phillips on January 12, 1994, in Phillips's office and surreptitiously recorded their conversation. The transcript of this conversation covers some 54 pages. Phillips acknowledged that the transcript accurately reports the discussion. During this conversation, Phillips and Williams stated their respective positions repetitively and unyieldingly, but with little rancor. Phillips maintained that Williams's abysmal sales record and heavy indebtedness to the company, and not his age, had brought about the decision to terminate him from active agent status. Phillips told Williams that to continue as an active agent he had to pay $ 18,000 on his company debt of approximately $ 30,000 immediately and pay an additional $ 500 each month until his sales commissions increased enough to cover his operating and office expenses. Williams said that he thought he was being discriminated against because of his age. He expressed his willingness to pay his debt and to work to increase his sales. But he contended that he could not do so unless he continued as an active agent with the full support of the organization.

Phillips, in effect, said that the company had gone as far as it was willing to go; that to allow Williams to maintain active status would add to organizational expenses and increase Williams's debt with little prospect of a dramatic increase in his sales. In response to Williams's question, Phillips said it would be acceptable for Williams to borrow $ 18,000 from a third person in order to stay in active agent status with the organization. But Williams did not pursue that idea. Instead, he said, "Well, I don't have anything that I can say to you that I'm going to do or not going to do. I just want the opportunity to serve my clients and to make money." At that point Phillips asked what Williams planned to do about "this discrimination thing." Williams said he did not plan to stop it but to let it run its course. Phillips responded, "Okay. What I want you to do is I want you to get all your stuff and move all your stuff out of the office, okay, ASAP." When Williams asked, "Are you kicking me out?", Phillips replied, "Yeah. I have been planning to kick you out for about three weeks."

Phillips explained to Williams that as an active agent he had been the lowest producer the previous year, that other active agents who failed to meet production requirements were paying $ 500 per month, that none of them owed the company nearly as much as Williams did, and that he did not believe Williams could pay $ 500 per month; but, Phillips ended up saying, "pay me and you can stay . . . if you come clean with this deal, you pay me off, we got a different deal. If not, leave. All I want is my money."

Phillips refused Williams's request that he be allowed to take his client files, because under the agreement Williams signed the files were CIGNA property. When Williams asked what would happen if he continued to come into the CIGNA office and try to do business, Phillips told him that he and his belongings would be moved out.

On January 13, 1994, Williams filed a retaliation complaint with the EEOC. On January 14, 1994, Williams recorded a shorter meeting he had with Phillips. Phillips asked Williams, "Have you thought . . . of anything that you would like to get out of it that would cause you to drop the charge?" Williams replied, "Nothing at the moment . . . ." Phillips agreed to give Williams assistance in packing his property into a truck, to forward his mail and phone calls, and to let him have access to his office during regular hours for a period of time to tend to clients he was still seeing. Phillips added, "We'll do everything that we can to help you, Arthur. I just, for the life of me, I cannot understand why you would go down there and file that suit and put yourself through this. " *** "Because you wouldn't have gone through this if you wouldn't have filed that suit." Williams complained about not being permitted to take his client files because of the CIGNA rules that provided the client files were company property. Phillips said, "Well, you can start changing these rules now. I mean, if you want to negotiate some deal, you can start changing this stuff. You know, as long as you got that grievance hanging over

our head, we are just going right down the policy line . . . . the ball is in your court."

The transcripts of Williams's recordings of the two meetings do not indicate that he ever offered a concrete proposal for repayment of any of his debt or that he ever stated that he would sign a retirement agreement.

Williams obtained an EEOC right to sue letter and brought suit against Cigna in state court for age discrimination in violation of the ADEA and the Texas Commission on Human Rights Act of 1983, and for unlawful retaliation in violation of the ADEA. Cigna removed the case to federal court and obtained a stay pending arbitration. The district court denied Cigna's motion but on appeal, a prior panel of this court reversed and remanded for entry of a stay. See *Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656, 658 (5th Cir. 1995)* (holding that the dispute was arbitrable under the arbitration agreement in the U-4 Form signed by Williams). Williams submitted his claims to an arbitration panel pursuant to NASD regulations. Cigna filed a counter claim based on Williams's debt to the company. Following the hearing, the arbitration panel issued a written award denying Williams's ADEA claims and awarding Cigna $ 18,945 on its counterclaim. The panel's written opinion fully states the issues submitted and the conclusions reached, but it gives no rationale or reasons for the decision.

Williams moved the district court to vacate the arbitration award, and the defendants moved to have it

confirmed. In its memorandum opinion and order the district court assigned reasons for its rejection of some of Williams's arguments, viz., that the arbitration award should be vacated because the panel did not give reasons for its decision, that Williams was denied adequate discovery or a continuance, and that the arbitrators were not sufficiently qualified. The district court rejected Williams's other arguments without assigning specific reasons. After the district court entered a final judgment, Williams appealed.

II. STANDARD OF REVIEW

Under the FAA, review of a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration proceeds like review of any other district court decision finding an agreement between parties, e.g., accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo*. See *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996 (5th Cir. 1995).*

Because a party who has not agreed to arbitrate normally has a right to seek a court's decision on the merits of his or her dispute with another person, the party's agreement to arbitrate that matter under the FAA is a relinquishment of much of that right's practical value. See *First Options, 514 U.S. at 942.* "The party still can ask a court to review the

arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. [**10] See, e.g., *9 U.S.C. § 10* (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan, 346 U.S. 427, 436-437, 98 L. Ed. 168, 74 S. Ct. 182*[](1953)(parties bound by arbitrator's decision not in 'manifest disregard' of the law)[.]" *First Options, 514 U.S. at 942* (noting that Wilko was overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).*

Before First Options, the state and federal courts had begun to recognize nonstatutory standards of judicial review of challenged arbitral awards under the Labor Management Relations Act (LMRA) and the FAA, relying on the statements of the Supreme Court in *Wilko, 346 U.S. at 436-37* (award valid if not in "manifest disregard" of the law), and *United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)*(award legitimate if "it draws its essence from the collective bargaining agreement."). GABRIEL M. WILNER, 1 DOMKE ON COMMERCIAL ARBITRATION § 34:01, at 2 (Rev. ed. 1998). Most state and federal courts recognized one or more nonstatutory grounds warranting vacatur of an arbitral award, including: (1) the arbitrator's manifest disregard of the law; (2) the award's conflict with a strong public policy; (3) the award being arbitrary and capricious; (4) the award being

completely irrational; or (5) the award's failure to draw its essence from the underlying contract. Id. § 34:07, at 14.

Panels of this circuit have recognized at least three of these nonstatutory grounds for vacatur of arbitration awards in LMRA and FAA cases: (1) Award contrary to public policy. See *Exxon Corp. v. Baton Rouge Oil and Chemical Workers, 77 F.3d 850, 853 (5th Cir. 1996); Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 248-55* (5th Cir.) (citing *United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 43, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987))*, cert. denied, *510 U.S. 965, 114 S. Ct. 441, 126 L. Ed. 2d 375 (1993)*. (2) Arbitrary and capricious award. See *Manville Forest Products Corp. v. United Paperworks International Union, 831 F.2d 72, 74 (5th Cir. 1987); Safeway Stores v. American Bakery and Confectionery Workers, Local 111, 390 F.2d 79, 82 (5th Cir. 1968)*. (3) Award's failure to draw its essence from underlying contract. See *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 164 (5th Cir. 1998); Exxon Corp. v. Baton Rouge O.C.W., 77 F.3d 850, 853 (5th Cir. 1996); Executone Information Systems, Inc. v. Davis, 26 F.3d 1314, 1324 (5th Cir. 1994)*(citing *United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960)); Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990)*.

Prior to the Supreme Court's decision in First Options, two panels of this circuit declined to recognize the manifest disregard standard in FAA cases involving commercial contract disputes between security brokers and investors. See *McIlroy v. PaineWebber Inc., 989 F.2d 817 (5th Cir. 1993); R.M. Perez & Associates, Inc. v. Welch, 960 F.2d 534 (5th Cir. 1992).* In a third FAA case pre-dating First Options, involving a commercial dispute between parties to an oil purchase contract, a panel of this court stated in dictum that judicial review of a commercial arbitration award is limited to sections 10 and 11 of the FAA. See *Forsythe International, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1019 (5th Cir. 1990).* The panel did not consider or decline to recognize a nonstatutory basis for vacatur, because the district court had vacated and remanded the arbitration award for fraud and misconduct solely on FAA statutory grounds.

Consequently, this is the first case in which we consider recognition of the manifest disregard of the law standard in reviewing the compulsory arbitration of an employee's federal statutory employment rights claim under the FAA based on the employee's non-collective bargaining agreement to arbitrate as a pre-condition of his employment. And it is the first time we have considered whether to apply the manifest disregard standard since it was approved by the Supreme Court in First Options.

This case involves a claim under the ADEA, but our decision will have implications for the review of arbitration

claims under the FAA involving Title VII of the Civil Rights Act of 1964 (Title VII) and other federal employment rights statutes. Employees, as individuals, are protected by a wide variety of rights created by federal statutes. See IAN R. MACNEIL ET AL., 2 FEDERAL ARBITRATION LAW § 16.5.1.1, at 16:76. These include Title VII, which protects individuals against discrimination in employment and seeks to assure equal employment opportunities; the Fair Labor Standards Act (FLSA), which provides employees with a judicial remedy in the federal courts to enforce the statutory right to minimum wages and overtime pay claims against employers; and the ADEA, which protects employees 40 years of age or older who are fired or discriminated against because of age. The ADEA has been called a "hybrid" between Title VII and the FLSA, because it draws upon Title VII for its substantive provisions and upon the FLSA for its remedial scheme. Id.; see Comment, The Arbitrability of ADEA Claims: Toward an Epistemology of Congressional Silence, *23 COLUM. J.L. & SOC. PROBS. 67, 74-83 (1989).*

Williams and his amici argue that we should recognize that an arbitrator's award under the FAA compulsorily adjudicating an individual employee's federal statutory employment claim may be vacated for manifest disregard of the law because of First Options' approval of the standard for use in all FAA cases, and because *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* and its progeny require

judicial scrutiny of arbitration awards under the FAA involving ADEA and Title VII claims sufficient to ensure that arbitrators comply with the requirements of those federal employment anti-discrimination statutes. We agree.

In our opinion, clear approval of the "manifest disregard" of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court's statement in First Options that "parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law." *First Options, 514 U.S. at 942.* Accord *Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456, 1459 (11th Cir. 1997); Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997),* cert. denied, *523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998); Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1486 (D.C. Cir. 1997); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844 (6th Cir. 1996);* see IAN R. MACNEIL ET AL., 4 FEDERAL ARBITRATION LAW § 40.7.1, at 40:43 (Supp. 1999)(First Options "gives the Supreme Court's seal of approval to manifest disregard doctrine[.]"). Even before First Options, many circuits had adopted the manifest disregard of law standard in reviewing arbitration awards under the FAA. See *United Transportation Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376 (3d Cir. 1995); Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994),* cert. denied, *513 U.S. 1112, 115 S. Ct. 903, 130 L. Ed. 2d 786 (1995); Lee v. Chica, 983 F.2d 883* (8th Cir.), cert. denied, *510 U.S. 906, 114 S. Ct. 287, 126 L. Ed. 2d*

237 (1993); Health Services Management Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992); Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631 (10th Cir. 1988); Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986); Bender v. Smith Barney, Harris Upham & Co., 901 F. Supp. 863 (D.N.J. 1994), aff'd, *67 F.3d 291 (3d Cir. 1995)*. Accordingly, each of the other numbered federal circuit courts and the D.C. Circuit have recognized manifest disregard of the law as either an implicit or nonstatutory ground for vacatur under the FAA. See MACNEIL, supra, § 40.7.2.1.

Prior to Gilmer, three courts of appeals had barred the enforcement of agreements in individual employment contracts subject to the FAA to arbitrate Title VII claims. See *Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990)*, vacated, *500 U.S. 930, 111 S. Ct. 2050, 114 L. Ed. 2d 456 (1991); Utley v. Goldman, Sachs & Co., 883 F.2d 184 (1st Cir. 1989)*, cert. denied, *493 U.S. 1045, 110 S. Ct. 842, 107 L. Ed. 2d 836 (1990); Swenson v. Management Recruiters International, Inc., 858 F.2d 1304* (8th Cir.), cert. denied, *493 U.S. 848, 110 S. Ct. 143, 107 L. Ed. 2d 102 (1989)*. One court of appeal and a majority of district courts that had addressed the issue had held that ADEA claims between private employees and employers are nonarbitrable under the FAA. See *Nicholson v. CPC International, Inc., 877 F.2d 221, 223 (3rd Cir. 1989)*; see G. Richard Shell, ERISA and other Federal Employment

Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?, *68 TEX. L. REV. 509, 571 n.447 (1990)*. The reasoning of these courts and scholarly commentators of the same view may be paraphrased as follows: The antidiscrimination purpose of Title VII and ADEA and the statutes' focus on providing both individual remedies and mechanisms for institutional reform suggest that private arbitration of claims will conflict with the statutory goals. Commercial arbitration is focused too narrowly on specific transactions to give effect to the institutional goals of the legislation. Industry customs and norms that inform commercial arbitral decision making may be infected with the very biases the statutes were enacted to overcome. This possibility argues strongly for the adjudication of claims under Title VII and the ADEA by the courts or an independent government tribunal. "Finally, cases brought under the [statutes] are not purely economic in nature. Rather they involve questions of personal dignity and worth that are precisely the kinds of 'core value' questions that should be reserved for a court. It is thus not stretching too far to assume that Congress meant to forbid private arbitration of [Title VII and ADEA] discrimination claims under the FAA." Shell, supra, at 568-70, 571-72; see Comment, supra, at 109-12, 113-14.

In Gilmer, however, the Supreme Court rejected arguments based on these reasons in holding that an employee's ADEA claim can be subjected to compulsory arbitration under the FAA pursuant to a non-collective

bargaining agreement to arbitrate signed by the employee as a pre-condition of his employment. The Court agreed that the ADEA is designed not only to address individual grievances, but also to further important social policies. But, the Court reasoned, the Sherman Act, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933 all are designed to advance important public policies, and the Court had already held that claims under them are appropriate for arbitration. *Gilmer, 500* U.S. at 27.

Further, the Court based its decision on three crucial assumptions or predictions: (1)"'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" Id. at 25 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985));* (2) "'So long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *500 U.S. at 27* (quoting *Mitsubishi, 473 U.S. at 628);* and (3) "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *500 U.S. at 32 n.4* (quoting *Shearson/American*

Express, Inc. v. McMahon, 482 U.S. 220, 232, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)).

Following the Gilmer reasoning, most of the courts of appeals have concluded that individual Title VII claims can be subjected to compulsory arbitration under employees' non-collective bargaining agreements to arbitrate pursuant to the FAA. See *Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998)*, cert. denied, *143 L. Ed. 2d 38, 119 S. Ct. 1028 (1999); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997); Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991)*. The Ninth Circuit has held, however, that Congress in the Civil Rights Act of 1991 intended to preclude the arbitration of Title VII and, perhaps, other civil rights claims. See *Duffield v. Robertson Stephens & Co., 144 F.3d 1182* (9th Cir.), cert. denied, *142 L. Ed. 2d 418, 119 S. Ct. 465 (1998)*.

The Supreme Court's assumptions and predictions in Gilmer assign heavy responsibilities to arbitrators and the federal courts. Arbitrators have a duty to ensure that, in the prospective subjection of federal statutory employment rights claims to compulsory arbitration, employees will not forgo substantive statutory rights or effective vindication of

their statutory causes of action, and the statutes will continue to serve both their remedial and deterrent functions. The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes. In other words, the Gilmer Court anticipated that an employee's prospective waiver of the right to a court's decision about the merits of his or her future ADEA or Title VII disputes would not have the effect that it does in ordinary commercial arbitration-"relinquishment [of] much of that right's practical value." *First Options, 514 U.S. at 942.* Accordingly, the judicial review of arbitral adjudication of federal statutory employment rights under the FAA and the "manifest disregard of the law" standard "'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer, 500* U.S. at 32 n.4 (quoting *Shearson/American Express, 482 U.S. at 232);* see *Cole, 105 F.3d at 1487.*

Williams also urges us to recognize and apply another standard of review, viz., by analogy, the standard adopted by this court in *Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972),* for reviewing the determination by a district court, in deciding an employee's Title VII claim, whether to defer to a prior arbitration award under a collective bargaining agreement. But the differences between collective bargaining contract arbitration under the LMRA and commercial arbitration under the FAA are too great for us to easily infer that the deferral standard once

used with regard to the former is suitable as a judicial review standard with respect to the latter. The Supreme Court's opinions and scholarly commentary have cogently pointed out the inherent differences in purpose, structure, and methodology between labor and commercial arbitration. E.g., *Gilmer, 500* U.S. at 33-35; see Shell, *68 TEX. L. REV. at 512* ("The differences between these two arbitration forums run deep. Scholars have long noted two models of the arbitration process. Under the first model, arbitration is viewed as a form of extended negotiation between highly interdependent parties . . . . Under the second model, arbitration is a cheap and efficient form of trial for resolving transactional disputes. The second model requires arbitrators to act as judges." (footnotes omitted)). In fact, the disparities are so great that they largely explain the difference in attitude of the Supreme Court in permitting only discretionary deference to labor arbitration awards under LMRA collective bargaining agreements by courts in Title VII actions, *Alexander v. Gardner-Denver Co.,. 415 U.S. 36, 58, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)* (rejecting the more stringent deferral standard of *Rios, 467 F.2d at 58),* while allowing ADEA claims to be subjected to compulsory arbitration under the FAA pursuant to a prospective pre-employment arbitration agreement. *Gilmer, 500* U.S. at 27; see Shell, *68 Tex. L. Rev. at 510-40.*

Iii. DISCUSSION

A. The Abitrators' Adjudication of the ADEA Claim

The concept of "manifest disregard of the law" has not been defined by the Supreme Court. The circuits have adopted various formulations.[2] As indicated by our foregoing recognition of the standard, we agree with the D.C. Circuit that, "in this statutory context, the 'manifest disregard of law' standard must be defined in light of the bases underlying the Court's decisions in Gilmer-type cases." *Cole, 105 F.3d at 1487.* Professors MacNeil, Speidel, and Stipanowich have made a "modest proposal" that should prove helpful as a basis for articulating and applying the manifest disregard doctrine in the present context:

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.
>
> Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.

MACNEIL, supra, § 40.7.2.6, at 40:95 (footnote omitted).

On the information available to us in the present case, which includes a verbatim transcript of the proceedings, we conclude that it is not manifest that the arbitrators acted contrary to the applicable law in rejecting Williams's ADEA age discrimination and retaliation claims. Consequently, in this case, we need not undertake the second step of the manifest disregard analysis, which entails an inquiry into whether the award will result in significant injustice, that comes into play only when it is manifest that the arbitrators acted contrary to the applicable law.

The evidence solidly supports a reasonable finding that Cigna terminated Williams's active agent status, not because of his age, but because of his long period of less than cost-effective sales performance and his burgeoning indebtedness to the company resulting from his loans against anticipated but unrealized commissions.

Nor is it manifest that the arbitrators acted contrary to the applicable law in rejecting Williams's retaliation claim. [3] While it is undisputed that Williams's filing of an EEOC charge constituted participation in a protected activity, a reasonable arbitrator could have found that he did not suffer an adverse employment action and that any disadvantage he suffered was not causally related to his EEOC claim. At the meeting on December 22, 1993, the Cigna officers told Williams that if he could not reduce his debt to the company by $ 18,000 immediately, that he must accept the company's offer to allow him to change to retired agent or broker status

before January 1, 1994 or his relationship with Cigna would be terminated completely. Williams rejected Cigna's offer of retired agent or broker status by his failure to accept the offer before it expired on January 1, 1994 and resulted in his absolute termination. Because Williams filed his EEOC complaint four days later on January 5, 1994 there is no evidence of a causal link between his complaint and his termination.[4]

Consequently, we conclude that based on the record presented for our review it is not manifest that the arbitrators acted contrary to the applicable law and that their award should be upheld insofar as their rejection of the ADEA discrimination and retaliation claims are concerned.

B. Private Arbitration Panel "Forum" Fees

Williams alternatively contends that the arbitrators' order that he pay $ 3,150 as his one-half share of the forum fees is contrary to public policy. In support of this argument, Williams relies on the D.C. Circuit's interpretation of *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)*, as holding implicitly that as a matter of law ADEA claimants may not be forced to pay any part of arbitrators' fees and expenses. *Cole, 105 F.3d at 1483-86;* accord *Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 1235 (10th Cir. 1999)*. In our opinion, however, Gilmer does not so clearly imply that no part of arbitral forum fees may ever be assessed against federal

anti-discrimination claimants, although it plainly indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims. *Gilmer, 500* U.S. at 28.

The Supreme Court in Gilmer made it clear that a party agreeing to arbitrate a federal statutory claim does not forgo the substantive rights afforded by the statute, and that claims under federal statutes are appropriate for arbitration so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, and the statute will continue to serve both its remedial and deterrent function. *Gilmer, 500* U.S. at 26, 28. Gilmer, and the cases upon which it relies, make clear that whether a federal statutory claim can be subjected to compulsory arbitration depends upon whether the particular arbitral forum involved provides an adequate substitute for a judicial forum in protecting the particular statutory right at issue. See *Shearson/American Express, 482 U.S. at 229; McDonald v. City of West Branch, 466 U.S. 284, 290, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984).* "In arguing that arbitration is inconsistent with the ADEA, Gilmer . . . raised a host of challenges to the adequacy of arbitration procedures." *Gilmer, 500* U.S. at 30. The Court rejected each of Gilmer's arguments in whole or in substantial part because of the particular characteristics of the NYSE arbitral forum. The NYSE arbitration rules and judicial review provided adequate protections against biased panels. Id. The NYSE discovery provisions, which allowed document production,

information requests, depositions, and subpoenas would be adequate to allow ADEA claimants a fair opportunity to present claims. Id. at 31. Although some arbitrators often will not issue written opinions, the NYSE rules require that all arbitration awards be in writing. Id. Although arbitration procedures do not provide for class actions, the NYSE rules do not restrict the types of relief, allowing arbitrators to fashion equitable relief, and do provide for collective proceedings. Id. at 32. The Court in Gilmer did not consider the question of whether an arbitration forum that requires an ADEA claimant to pay all or part of the arbitrators' compensation can be an adequate substitute for a judicial forum. Evidently, Gilmer did not include a complaint about forum fees in his host of challenges.[5] In concluding its disposition of Gilmer's challenges to the adequacy of arbitration procedures, however, the Gilmer Court pointed to some of the basic principles governing the enforceability of arbitration contracts and procedures: (1) "arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Gilmer, 500* U.S. at 33 (citing *9 U.S.C. § 2);* (2) "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'" id. (citing *Mitsubishi, 473 U.S. at 627);* and (3) "claimed procedural inadequacies [and] claims of unequal bargaining power [are] best left for resolution in specific cases." Id.

Under the NASD regulations in effect at the inception of this case, a party who files an arbitration claim is required to pay a non-refundable filing fee and a hearing session deposit "unless such fee or deposit is specifically waived by the Director of Arbitration." NASD CODE OF ARBITRATION PROCEDURE § 10205(a) (Aug. 1996). NASD regulations aiso direct arbitrators to "determine the amount chargeable to the parties as forum fees and [] determine who shall pay such forum fees." NASD CODE OF ARBITRATION PROCEDURE, supra, § 10205(c).

Pursuant to these regulations, Williams paid a non-refundable filing fee of $ 500 and a hearing session deposit of $ 1,500 prior to the arbitration hearing. The forum fees were calculated at the rate of $ 1,500 for each hearing session and $ 300 for each pre-hearing conference, for a total cost of $ 6,300. The arbitration panel assessed the costs of the forum fees equally between the two sides and, after subtracting Williams' $ 1,500 deposit, determined that he owed $ 1,650 for forum fees.

While this case was pending, the SEC on June 29, 1998 approved a proposed rule change offered by the NASD that abolishes mandatory NASD arbitration of statutory employment discrimination claims. See Self Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, *63 Fed. Reg. 35299, 35303 (1998)*. The rule change became effective on January 1, 1999. Id.; see

Desiderio v. National Association of Securities Dealers, Inc., 191 F.3d 198, 201 (2d Cir. 1999).

In the present case, Williams has not demonstrated that the arbitrators' order that he pay one-half of the forum fees prevented him from having a full opportunity to vindicate his claims effectively or prevented the arbitration proceedings from affording him an adequate substitute for a federal judicial forum. The evidence in this case does not indicate that Williams is unable to pay one-half of the forum fees or that they are prohibitively expensive for him. Cf. *Shankle, 163 F.3d at 1230* (plaintiff "could not afford such a fee"); *Cole, 105 F.3d at 1484* (fees"prohibitively expensive for an employee like Cole"). In the arbitration hearing on October 16, 1996 Williams testified that he was making more money than he did at Cigna and his "income so far this year is excess of six figures." There is no evidence that the prospect of incurring forum fees hampered or discouraged Williams in the prosecution of his claim. Because of NASD's rule change abolishing mandatory arbitration of statutory employment discrimination claims, such causes of action arising after January 1, 1999 may be filed in the appropriate state or federal court. Consequently, the present case clearly does not call upon us to address the serious question of whether the legislative intent of employees' anti-discrimination statutes in general is undermined by the effects of mandatory arbitration and arbitrators' fees.

IV. CONCLUSION

For the reasons assigned, the judgment of the district court upholding the arbitrators' award is AFFIRMED.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

[1] Cigna employs three types of agents: (1) active agents receive an office, administrative support and all fringe benefits, (2) retired agents receive an office, administrative support and partial fringe benefits, and (3) brokers do not receive an office, administrative support, or any fringe benefits.

[2] See, e.g., *Advest Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990)*("where it is clear from the record that the arbitrator recognized the applicable law-and then ignored it"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986)*("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." (citations omitted)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)*("an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."); *Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992)*("there must be something beyond and different from mere error in law or failure on the part of the

arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did.").

[3] It is unlawful for an employer to retaliate against an employee for filing a charge pursuant to the ADEA. *29 U.S.C.* § *623*(d). To establish a prima facie case of unlawful retaliation, a plaintiff must show: (1) participation in a protected activity; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. See *Holt v. JTM Industries, Inc., 89 F.3d 1224, 1225-26 (5th Cir. 1996)*, cert. denied, *520 U.S. 1229, 117 S. Ct. 1821, 137 L. Ed. 2d 1029 (1997)*.

[4] The after-the-fact remarks by Phillips upon learning of Williams's ADEA claim do not evince retaliatory motive or action. Rather, Phillips's comments may be read as an expression of his candid opinion that Williams had been foolish to reject Cigna's offer of retirement status to pursue a groundless discrimination claim; as requests that Williams drop the ADEA charges; and as overtures of compromise or settlement of the ADEA claims. The anti-retaliation provisions of the ADEA are not violated by an employer's reasonable defensive measures, requests to drop charges, or settlement proposals, unless they harm or disadvantage the employee. See *Torres v. Pisano, 116 F.3d 625, 639-40* (2d Cir.), cert. denied, *522 U.S. 997, 118 S. Ct. 563, 139 L Ed. 2d 404 (1997); Connell v. Bank of Boston, 924 F.2d*

1169, 1178-79 (1st Cir.), cert. denied, *501 U.S. 1218, 111 S. Ct. 2828, 115 L. Ed. 2d 997 (1991).*

[5] According to the D. C. Circuit, at the time of Gilmer's claim, under the NYSE and NASD Rules, it was standard practice in the securities industry for employers to pay all of the arbitrators' fees. See *Cole, 105 F.3d at 1483* (citing Daily Lab. Rep. (BNA) No. 93, at A-3 (May 14, 1996)).

No. 94-11030

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTHUR H. WILLIAMS, Plaintiff-Appellee, versus
CIGNA FINANCIAL ADVISORS, INC., ET AL.,
Defendants-Appellants.

June 19, 1995, Decided

COUNSEL:

ATTORNEYS FOR APPELLANTS: COZEN & O'CONNOR, Dallas, TX, James E. Davis -do-, Rogge Dunn -do-.

FOR: AMICUS CURIAE - EQUAL EMPLOYMENT ADIVSORY CNSL.: McGUINESS & WILLIAMS, WA/DC, Douglas S. McDowell -do-, Ann Elizabeth Reesman, -do-.

Arthur H. Williams, Pro Se, Irving, TX.

ATTORNEYS FOR APPELLEES: ROBLES & ASSOCIATES, Dallas, TX, Nancy DeLeon -do-, Gabriel Robles -do-.

FOR: AMICUS CURIAE-AMERICAN ASSOC. OF RETIRED PERSONS: Cathy Ventrell-Monsees, WA/DC.

JUDGES:
Before HIGGINBOTHAM and PARKER, Circuit Judges, and McBRYDE, District Judge. *

oOPINIONBY:
PATRICK E. HIGGINBOTHAM

OPINION:

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Arthur H. Williams filed suit against the defendants, collectively referred to as Cigna, alleging age discrimination. Cigna moved for a stay pending arbitration pursuant to Williams' registration agreement with the National Association of Securities Dealers. The district court denied Cigna's motion. We find that Williams' dispute is subject to arbitration and remand for entry of an order staying proceedings pending arbitration

I.

In 1987, Williams began working at Cigna, which is a member firm of the National Association of Securities Dealers. On July 15, 1987, Williams signed a Registered Representative Agreement with Cigna, which required that he maintain a current NASD registration and adhere to

NASD rules. On July 17, 1987, Williams registered with NASD by signing a Uniform Application For Securities Industry Registration Or Transfer, also known as a U-4 Registration. The U-4 Registration contract between Williams and NASD provided that Williams would "abide by, comply with, and adhere to all the provisions, conditions and covenants of the . . . by-laws and rules and regulations of [NASD] as they are and may be adopted, changed or amended from time to time." The U-4 Registration also provided for mandatory arbitration of "any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." In 1987, the NASD Code of Arbitration Procedure provided

> for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of [NASD], with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> > (1) between or among members;

> (2) between or among members and public customers, or others.

On October 1, 1993, the Securities and Exchange Commission amended its NASD rules to provide "for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [NASD] or arising out of the employment or termination of employment of associated person(s) with any member." While this regulation was not in effect when Williams signed his first U-4 Registration, it was in effect on October 20, 1993 when Williams executed a second U-4 Registration to sell securities in Colorado.

On December 15, 1993, Cigna terminated Williams. On January 5, 1994, Williams filed an age discrimination claim against Cigna with the Equal Employment Opportunity Commission. On April 13, 1994, after receiving a Notice of Right to Sue from the EEOC, Williams filed suit in state court, claiming recovery under the Age Discrimination in Employment Act. Cigna removed the action to federal court and filed a motion to dismiss, which the district court denied on August 29, 1994. On or about September 16, 1994, Cigna discovered that Williams had signed a written agreement requiring arbitration of his claim and moved for a stay of proceedings pending arbitration. The court denied Cigna's motion, finding it "completely lacking in legal merit." Cigna filed this interlocutory appeal pursuant to 9 *U.S.C.* § *16*(a)(1)(A).

II.

The first step in our analysis is to determine whether the arbitration clause encompasses employment disputes. Plainly, it does. In 1987, Williams agreed to adhere to NASD rules "as they are and may be adopted, changed or amended from time to time." By October 1993, when Williams signed a second U-4 Registration, the NASD rules concerning arbitration explicitly mandated that employment disputes be arbitrated.

A similar situation was presented in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*. Gilmer worked for Interstate as its Manager of Financial Services. As a condition of his employment, he was required to register as a securities representative with the New York Stock Exchange. The U-4 Registration that Gilmer signed mandated arbitration as required by NYSE rules. NYSE rules provided "for arbitration of 'any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.'" *111 S. Ct. at 1651*. When Interstate terminated Gilmer, Gilmer filed an age discrimination complaint. Interstate filed a motion to stay the proceeding pending arbitration, which the district court denied. The Fourth Circuit reversed, and the Supreme Court affirmed. The Court held that nothing within the strictures of ADEA or its legislative history "evinced an

intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. at 1652 (citation and internal quotation marks omitted).

Williams attempts to distinguish Gilmer on the grounds that when Gilmer signed his U-4 Registration, NYSE rules explicitly provided for arbitration of employment disputes. By contrast, Williams notes that when he signed his first U-4 Registration, NASD rules did not explicitly provide for arbitration of employment disputes. Even if it were true that the 1987 NASD arbitration rules did not encompass employment disputes, an issue we do not today decide,[2] Williams' argument would still be without merit. Cigna terminated Williams after the NASD rules were amended to provide for arbitration of employment disputes and after Williams executed a second U-4 Registration. Therefore, Williams' agreement with NASD encompasses arbitration of his employment dispute.

III.

Since Williams agreed to arbitrate his employment claims, we next must address the applicability of the Federal Arbitration Act to that agreement. The FAA provides that a written agreement to arbitrate a dispute arising out of that agreement is enforceable so long as the agreement is one "evidencing a transaction involving commerce." *9 U.S.C.* § 2. Williams' U-4 Registration is a contract involving the sale of securities and thus involves commerce. See *Gilmer*,

111 S. Ct. at 1650-51 (implicitly holding FAA applicable to U-4 Registration); see also *Allied-Bruce Terminix Cos., Inc. v. Dobson, 130 L. Ed. 2d 753, 115 S. Ct. 834, 841 (1995)* (Congress exercised its "commerce power to the full" in enacting § 2 of the FAA). Section 3 of the FAA mandates that when an issue is referable to arbitration pursuant to a written agreement, the district court must "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Section 1 of the FAA exempts from its operation "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Williams argues that his dispute is exempt under § 1 because the arbitration clause is contained in a contract for employment and he was a worker engaged in interstate commerce. This argument is without merit, because the agreement to arbitrate is not contained in a contract for employment but in Williams' U-4 Registration. Williams counters that even though his agreement to arbitrate is contained in the U-4 Registration, it was also incorporated by reference into his employment agreement with Cigna. However, it is the U-4 Registration that is the source of the arbitration agreement, not Williams' contract with Cigna. Stated another way, if we were to hold that Williams' Registered Representative Agreement incorporated by reference the U-4 Registration arbitration

clause, § 1 would still exempt only the contract of employment. The U-4 Registration is a separate contract, and its arbitration clause is enforceable under the FAA. See *Gilmer, 111 S. Ct. at 1651-52 n.2.*

This narrow interpretation of § 1 is in line with other courts that have considered the issue. For instance, the Supreme Court in Gilmer noted:

It would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . . The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications.

Id.; accord *Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230* n. * (5th Cir. 1991).

IV.

Williams also argues that his agreement to arbitrate is not enforceable because he did not knowingly and

voluntarily waive his right to a judicial forum as required by the Older Workers Benefit Protection Act. Pub. L. No. 101-433, 104 Stat. 978 (1990) (amending ADEA at *29 U.S.C.* § § *621*, 623, 626, 630). Specifically, Williams argues that ADEA gives him a right to a jury trial that may not be waived absent compliance with the procedures set forth in the OWBPA. *29 U.S.C.* § *626*(c)(2). The OWBPA requires, among other things, that a waiver of a right or claim be in writing, that it be between the individual and the employer, and that it specifically refer to rights or claims arising under ADEA Id. § 626(f)(1).

Williams' argument is without merit. In enacting the OWBPA, Congress' primary concern was with releases and voluntary separation agreements in which employees were forced to waive their rights. S. Rep. No. 263, 101st Cong., 2d Sess. 31-35 (1990), reprinted in 1990 U.S.C.A.A.N. 1509, 1537-41. There is no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes. See Douglas E. Abrams, Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment, *26 Conn. L. Rev. 521, 555 n.187 (1994).* Moreover, the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum. Cf. *Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877, 881-82* (9th Cir.), cert. denied, *121 L. Ed. 2d 432, 113 S. Ct. 494 (1992)* (holding that provision in Employee Polygraph Protection Act precluding waiver of the "rights and procedures" provided under the Act did not

make an agreement to arbitrate unenforceable); see also Abrams, supra, *26 Conn. L. Rev. at 555 n.187.* The Supreme Court recognized this distinction in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985),* in which it held that

> by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

We recognize that Congress, through the OWBPA, has protected terminated employees who waive their substantive rights under ADEA in exchange for a more favorable severance package; however, we find no clear indication that Congress was likewise concerned with protecting employees who agree to arbitrate claims that may arise during the course of their employment.

There is yet another reason for holding the OWBPA inapplicable. Section 626(f)(1)(C) provides that to be considered knowing and voluntary, an employee cannot "waive rights or claims that may arise after the date the waiver is executed." If we were to hold that an arbitration clause in a U-4 Registration had to comply with the OWBPA's waiver provisions, we would in effect be holding that employers and employees could never enforce a pre-dispute agreement to arbitrate. We decline to remove from the province of arbitration all such pre-dispute agreements absent a clear indication that Congress intended such a result. See *Gilmer, 111 S. Ct. at 1652* (burden is on party seeking to avoid arbitration to show that "Congress intended to preclude a waiver of a judicial forum for ADEA claims"); see also id. at 1653-54 ("Congress . . . did not explicitly preclude arbitration . . . even in its recent amendments [OWBPA] to the ADEA."); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)* ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); David L. Shapiro, Continuity and Change in Statutory Interpretation, *67 N.Y.U. L. Rev. 921 (1992).*

Williams also argues, for the first time on appeal, that apart from the OWBPA and as a general rule, his waiver of a judicial forum must be knowing and voluntary. See *Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994),* petition for cert. filed, *63 U.S.L.W. 3861* (U.S.

May 22, 1995) (No. 94-1923). In support of his claim that he did not knowingly waive his right to a judicial forum, Williams has included in his record excerpts an affidavit dated February 1, 1995. This affidavit is not part of the record, and we will not consider a factual issue raised for the first time on appeal. See *Citizens Nat'l Bank v. Taylor (In re Goff), 812 F.2d 931, 933 (5th Cir. 1987); Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 296 (5th Cir. 1987).*

V.

Although the FAA makes contracts containing arbitration clauses enforceable, "the right to arbitration, like any other contract right, can be waived." *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc., 781 F.2d 494, 497 (5th Cir. 1986)* (citation and internal quotation marks omitted). However, "waiver of arbitration is not a favored finding, and there is a presumption against it." *Id. at 496.* Williams argues that Cigna waived its right to seek arbitration because it "substantially invoked the judicial process to the detriment or prejudice of the other party." *Id. at 497.* In *Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986),* the court found that a waiver had occurred where Drexel "initiated extensive discovery, answered twice, filed motions to dismiss and for summary judgment, filed and obtained two extensions of pre-trial deadlines," delayed seventeen months, and caused the other side to incur attorney's fees. The court found that these

numerous actions were "unlike a perfunctory motion to dismiss before answering." *Id. at 1162.*

Unlike Drexel, Cigna did not substantially invoke the judicial process and waive its right to arbitration. Cigna removed the action to federal court, filed a motion to dismiss, filed a motion to stay proceedings, answered Williams' complaint, asserted a counterclaim, and exchanged Rule 26 discovery. Cigna filed its motion for a stay pending arbitration as soon as it discovered that the dispute was subject to arbitration.[3] It answered Williams' complaint only after it filed its motion for stay pending arbitration and after Williams claimed that Cigna was in default for failing to answer. The answer included a counterclaim that was compulsory under Fed. R. Civ. P. 13(a). After Cigna filed its motion for stay pending arbitration, it also filed a motion to stay discovery pending the court's ruling on the arbitration motion. The court denied Cigna's motion to stay discovery and when Cigna sought letter agreements confirming that its response to Williams' discovery request would not constitute a waiver of its right to seek arbitration, Williams refused. In sum, Cigna did not "substantially invoke[] the judicial process" and waive its right to seek arbitration.

VI.

For the foregoing reasons, we VACATE the district court's order denying a stay pending arbitration and REMAND the case for entry of a stay.

----------Footnotes----------

* District Judge of the Northern District of Texas, sitting by designation.

[2] The circuits are split on whether NASD's pre-amendment arbitration rules encompassed employment disputes. Compare *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994), Kidd v. Equitable Life Assurance Soc'y of the United States, 32 F.3d 516, 519 (11th Cir. 1994)* and *Association of Inv. Brokers v. SEC, 219 U.S. App. D.C. 259, 676 F.2d 857, 861 (D.C. Cir. 1982)* with *Kresock v. Bankers Trust Co., 21 F.3d 176, 178 (7th Cir. 1994)*, and *Farrand v. Lutheran Bhd., 993 F.2d 1253, 1254-55 (7th Cir. 1993)* (Easterbrook, J.).

[3] Williams argues that since his contract with Cigna required that he register with NASD, Cigna should have known prior to removing the action that the dispute was arbitrable. However, Williams does not challenge Cigna's assertion that it filed its motion for a stay shortly after it actually discovered that the dispute was arbitrable.

No. 3:94-CV-0968-X

IN THE UNITIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ARTHUR H. WILLIAMS
Plaintiff,

vs.

CIGNA FINANCIAL ADVISORS, INC./CIGNA INDIVIDUAL FINANCIAL SERVICES, and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendants.

Filed Oct 27 1994

Before the Court are:

1) Defendants' Joint Motion to Stay Proceedings Pending Arbitration and Memorandum in Support, filed September 28, 1994;

2) Plaintiffs Response, filed October 12, 1994;

3) Defendants' Reply, filed October 26, 1994;

4) Defendants' Joint Motion for Temporary Stay of Discovery, filed October 20, 1994;

5) Plaintiff's Response, flied October 26, 1994; and

6) Plaintiffs Application for Default and Plaintiffs Motion for Sanctions, filed October 19, 1994.

The Court is disturbed by what it perceives to be a recurring pattern by the Defendants of evading this Court's Orders. The Court finds the Defendants' Joint Motion to Stay Proceedings as completely lacking in legal merit so that this motion is DENIED. Defendants' Joint Motion for Temporary Stay of Discovery is DENIED as well.

By the next business day after the Defendants' counsel receives this Order, the Defendants are ORDERED to comply with the Court's previous Orders, and exchange their Rule 26 disclosures. In addition, by the next business day after the Defendants' counsel receives this Order, the Defendants are ORDERED to file a responsive pleading to the Plaintiffs complaint, as previously ordered by this Court a month ago.

As for the Plaintiff's Motion for Default and for Sanctions, the Court shall DENY those motions at this time. Bearing in mind the proverb that "A word to the wise is sufficient," Defendants should consider this Order their warning to cease their delaying and contentious conduct. Further examples of such conduct will result in sanctions.

SO ORDERED this 27 day of October, 1994.

/s/Joe Kendall
U.S. District Judge

NASD
10 S. LaSalle St
20th Flr
Chicago, IL

Via Telecopy

October 11, 1996

Marc A. Susswein
Liddle & Robinson
685 Third Avenue
New York, NY 10017

Subject: NASD *Arbitration Number 95-04380*
Arthur Williams v Cigna Financial Advisors, Inc./Cigna Individual Financial Services & Connecticut General Life Insurance

Dear Mr. Susswein:

The panel has reviewed and considered then captioned case and finds as follows:

(1) The motion for postponement is denied.

Very truly yours,

/s/Susan M. Kozacik
Staff Attorney312-899-4440

SMK:SMK:LC53A
lr9/95

cc:all parties

Receipients:

Marc A. Susswein, Arthur H. Williams Rogge Dunn, Esq., Cigna Financial Advisors, Inc. Rogge Dunn, Esq., Connecticut General Life Insurance Co. Rogge Dunn, Esq., CIGNA Individual Financial Services

NASD
10 S. LaSalle St
20th Flr
Chicago, IL

October 14, 1996

Marc A. Susswein
Liddle & Robinson
685 Third Avenue
New York, NY 10017

Subject: *NASD Arbitration Number 95-04380*
Arthur Williams v Cigna Financial Advisors, Inc./Cigna Individual Financial Services & Connecticut General Life Insurance

Dear Mr. Susswein:

The panel has reviewed and considered the renewed request for adjournment and responses thereto. The panel unanimously denies the request for adjournment of the October 15, 16, 17, and 18 dates. The hearing will proceed on October 15 at 9:00 a.m. (Central time) as scheduled.

Very truly yours,

/s/Susan M. Kozacik
Staff Attorney312-899-4440

SMK:SMK:LC53A
lr9/95

cc:Douglas F. Pierce, Esq.
John M. Greer
Jack K. Lovette

December 5, 1996

NASD
10 S. LaSalle St
20th Flr
Chicago, IL

October 14, 1996

Marc A. Susswein
Liddle & Robinson
685 Third Avenue
New York, NY 10017

Subject: *NASD Arbitration Number 95-04380*
Arthur Williams v Cigna Financial Advisors, Inc./Cigna Individual Financial Services & Connecticut General Life Insurance

Dear Mr. Susswein:

In accordance with the NASD Code of Arbitration Procedure, a decision in the above-subject matter has been reached by the arbitrators and is enclosed.

Pursuant to Section 41 of the Code, all monetary awards shall be paid within thirty days of receipt. If an award is not paid within thirty days, the prevailing party shall be paid postjudgement interest at the legal rate or as provided in the award by the arbitrator(s).

Any questions regarding this decision should be directed to me. The parties must not contact the arbitrators directly.

Very truly yours,

/s/Susan M. Kozacik
Staff Attorney312-899-4440

SMK:SMK:LC53A
lr9/95
Enclosures

RECIPIENTS:

Marc A. Susswein, Arthur H. Williams
Liddle & Robinson, 685 Third Avenue, New York, NY 10017

Rogge Dunn, Esq., Cigna Financial Advisors, Inc. Mathews, Carlton, Stein, Sheils, et.al., 8131 LBJ Freeway, Suite 700, Dallas, TX 75251

Rogge Dunn, Esq., Connecticut General Life Insurance Co. Mathews, Carlton, Stein, Shells, et. al., 8131 LBJ Freeway, Suite 700, Dallas, TX 75251

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

ARTHUR H. WILLIAMS
Claimant,

vs.

CIGNA FINANCIAL ADVISORS, INC./CIGNA INDIVIDUAL FINANCIAL SERVICES, and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Respondents.

No. 95-04380

REPRESENTATION OF PARTIES

Claimant Arthur H. Williams was represented by W. Dan Boone, Esquire and Marc. A. Susswein, Esquire of Liddle & Robinson located in New York, New York.

Respondents Cigna Financial Advisors, Inc., Connecticut General Life Insurance Co., and Cigna Individual Financial Services were represented by R. Rogge Dunn, Esquire of Cozen and O'Connor located in Dallas, Texas.

CASE INFORMATION

Claimant Arthur H. Williams' Statement of Claim was filed on or about September 13, 1995

Claimant Arthur H. Williams' Submission Agreement was signed on September 27, 1995

Respondents Cigna Financial Advisors, Inc., Connecticut General Life Insurance Co., and Cigna Individual Financial Services joint Statement of Answer and Counterclaim was filed on or about October 23, 1995.

Respondents Cigna Financial Advisors, Inc., and Cigna Individual Financial Services's joint Submission Agreement was signed on October 13, 1995, by Karen R. Matheson, Vice President of Cigna Financial Advisors, Inc.

Respondent Connecticut General Life Insurance Co.'s Submission Agreement was signed on October 12, 1995 by Theresa M. Herter, Vice President of Connecticut General Life Insurance Co.

HEARING INFORMATION

A pre-hearing conference was held on January 29, 1996 for one (1) session.

The hearing was held on:
October 15, 1996, for two (2) sessions;
October 16, 1996, for two (2) sessions; and
October 17, 1996, for two (2) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Arthur H. Williams ("Claimant") alleged that respondents Cigna Financial Advisors, Inc., Connecticut General Life Insurance, Co., and Cigna Individual Financial Services (hereinafter collectively referred to as "Respondents") subjected him to unlawful employment practices. Claimant asserted that Respondents directed him to sign a "Retired Agent's Agreement" and that at this time they informed him that he owed them $32,000.00 for expenses incurred during the years 1992 and 1993. According to Claimant, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on January 5, 1994, claiming that he had been discriminated against because of his age, after which Respondents informed him that they were wrong in making him sign the "Retired Agent's Agreement" and asked him to withdraw the EEOC charge. Claimant further asserted that when he refused to withdraw the charge, his employment was terminated. Claimant stated that the next day he filed a retaliation charge with the EEOC against Respondents. Consequently, according to Claimant, he suffers from severe emotional distress and mental anguish. Claimant made the following legal claims: employment discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, and the Texas Commission on Human Rights Act of 1983 ("TCHRA"), as amended; and unlawful retaliation in violation of the ADEA.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that Claimant's sales performance was below Respondent's standards and Claimant had acquired an extremely high debt in money loaned by Respondents; Respondents contended that as a result of this, not because of his age, they decided to grant him three options: end his status as an "active agent" and take a "retired agent" status, which is the same with the exception that contributions are not made to the "retired agent's" pension plans; end his status as an "active agent" and become a broker, which is a position not provided the amenities of an "agent"; or remain an "active agent," if he would pay off some of the debt and show that he could pay a $500 a month overhead charge applied to "agents" who do not meet Respondent's standards. Respondents further contended that they tried to set up a meeting with Claimant to inform him of their decision, but Claimant was repeatedly unavailable.

Respondents stated that although on December 15, 1993, they processed paperwork terminating Claimant's status as an "active agent," they finally met with Claimant on December 21 or December 22, 1993, and informed him of their decision to grant him the three options. Respondents contended that it is impossible to conclude that they decided to terminate Claimant in retaliation to his EEOC filing because they had decided to terminate him on December 5, 1993, and Claimant did not file his EEOC charge until January 5, 1994. Respondents made the following contentions: (1) Claimant cannot meet the burden of establishing a prima facie case for his claim under the ADEA (2) Claimant

is barred from bringing a claim under the TCHRA because he has not met the administrative prerequisites, because he has elected his remedy under the ADEA, and because this claim is barred by applicable statute of limitations and the doctrine of laches; and (3) Claimant cannot meet the burden for bringing a retaliation claim. In addition, Respondents brought a counterclaim against Claimant for debts he incurred under promissory notes, of which approximately $20,118.89 is still due.

RELIEF REQUESTED

Claimant Arthur H. Williams requested: a declaration stating that respondents Cigna Financial Advisors, Inc., Connecticut General Life Insurance, Co., and Cigna Individual Financial Services' ("Respondents") practices complained of are unlawful and violative of the Age Discrimination in Employment Act of 1967 ("ADEA") and the Texas Commission on Human Rights Act of 1983; an order requiring Respondents to "cease, eliminate and if necessary be enjoined from the violations"; an award for compensatory damages including back pay, front pay, reinstatement, retroactive seniority, lost benefits, and other relief, an award of costs and attorneys' fees; an award for liquidated damages as authorized by law for lost wages resulting from violation of Claimant's rights under the ADEA and an award in the amount of $8,000,000 for punitive damages.

Respondents requested: that the claims asserted against them be denied in their entirety: that they be awarded their costs

and attorneys' fees in defending these claims; that claimant Arthur H. Williams be made to repay the promissory notes due to respondent Connecticut General Life Insurance Co.; and that they be awarded their costs and attorneys' fees in prosecuting the counterclaim.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing, and post hearing submissions the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

(1) That claimant Arthur H. Williams is liable for and shall pay respondent Connecticut General Life Insurance Co. $18,945.00 in satisfaction of debt owed, against which respondent Connecticut General Life Insurance Co. may continue to attach the renewals due and owing claimant Arthur H. Williams from previous sales; and

(2) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically

awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of $1,500 per hearing session and $300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x $300 = $300. There were six (6) hearing sessions x $1,500 = $6,000 in forum fees. Total forum fees are $300 + $6,000 = $6,300. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of $500 and shall retain as forum fees the hearing session deposit in the amount of $1,500 previously deposited with NASD Regulation, Inc.. Office of Dispute Resolution by claimant Arthur H. Williams.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of $500 previously paid by respondent Cigna Financial Advisors, Inc.

Claimant Arthur H. Williams is liable for and shall pay forum fees in the amount of $1,650 (= $3,150 half of

forum fees $1,500 hearing session deposit previously paid by Claimant).

Respondents Cigna Financial Advisors, Inc., Connecticut General Life Insurance, Co., and Cigna Individual Financial 'Services are jointly and severally liable for and shall pay forum fees in the amount of $2,750.00 ($3,150 half of forum fees - $400 overpayment by respondent Cigna Financial Advisors, Inc. Insurance Co.)

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated: November 15, 1996
/s/ Douglas F. Pierce
Douglas F. Pierce, Esquire
Public Arbitrator, Presiding Chair

/s/ Jack K. Lovett 11-15-96
Jack K. Lovette
Public Arbitrator

/s/ John M. Greer 11/15/96
John M. Greer

Industry Arbitrator

Date of Service: November 29, 1996

No. 3:94-CV-0968-X

IN THE UNTIED STATES DISTRICT COURT
FOR THE NORRTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ARTHUR H. WILLIAMS
Plaintiff,

vs.

CIGNA FINANCIAL ADVISORS, INC./CIGNA INDIVIDUAL FINANCIAL SERVICES, and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendants.

Filed AUG 11, 1997

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's Motion to Lift Stay and Vacate Arbitration Award, filed on March 5, 1997, accompanied by a massive volume of exhibits. Defendants have submitted a Motion for the Court to Confirm the Arbitration Award, filed April 8, 1997. After careful examination of the motions and accompanying materials, the Court DENIES Plaintiffs motion and GRANTS Defendants' motion.

PROCEDURAL HISTORY

The facts of this case are essentially reprinted here from Williams v. CIGNA Financial Advisors, 56 F.3d 656 (5th Cir. 1995), as this dispute between the same parties develop from the same events.

Arthur H. Williams filed suit against the defendants, collectively referred to as Cigna, alleging age discrimination. Cigna moved for a stay pending arbitration pursuant to Williams' registration agreement with the National Association of Securities Dealers. The Court denied Cigna's motion, but the Fifth Circuit reversed the Court and remanded the case for entry of the order to stay proceedings in the case pending arbitration.

Arbitration was had in May, 1996, which resulted in a declaration by the arbitrators that Defendants owed Plaintiff nothing, but Plaintiff owed Defendants $18,945. Dissatisfied with this result, Plaintiff filed a motion requesting this court to lift the stay and vacate the arbitration award, on March 5, 1997. Just over a month later, Defendants submitted a cross-motion, asking the Court to confirm the arbitration award. Both Plaintiff and Defendant filed supplemental briefs in support of their respective positions.

DISCUSSION

At the outset, the Court notes that "judicial review of an arbitration award is extraordinarily narrow." *Antwine*

v. Prudential Bache Securities, Inc., 899 F.2d 410, 413 (5th Cir. 1990). The Federal Arbitration Act ("FAA") only permits decisions of arbitrators to be disturbed on grounds set out in that Act. *Gulf Coast Industrial Workers Union v. Exxon*, 70 F.3d 847 (5th Cir. *1995).*

The fundamental right to sue and have one's disputes resolved in the courts, a public forum charged with codified rules of procedure to insure the just adjudication of disputes among litigants, is in some degree compromised by the broad scope of the Act. However, Congress is the proper arbiter of public policy, not this Court, and, as the popularly-elected governmental body vested with the authority to make these policy judgments, it has determined that the extensive procedural protection and ultimate impartiality provided by the court system was worth sacrificing, in some sense, to saving the parties the costs of lengthy litigation and unclogging the court dockets. Consideration of notions of fair play and justice are considered in addition to the desirability of judicial economy. However, the Court does not believe that Plaintiff was denied his opportunity for a just adjudication of this dispute when he himself signed the contract indicating his willingness to be bound by arbitration in the event of a dispute. The Court is not intimating that all results of arbitration are conclusively foreclosed from the Court's review, but that review of the award is deferential, and only vacated in the most extreme circumstances. Plaintiff Williams has alleged several errors of the arbitrator, and we address each below.

Plaintiff's argument that the arbitrator's failure to provide a reason for his decision was a denial of due process justifying a vacatur, is without sound basis. Were arbitrators forced to justify in writing their every decision, much efficiency would be lost in the process, raising the costs, in terms of time and money, of what is theoretically an informal, 'speedy and inexpensive method of dispute resolution, freely chosen by the parties. This result would undermine the explicit policies Congress sought to further by enacting the Act. *Antwine v. Prudential Base Sec.*, 899 F.2d 410, 412 (5th Cir.1990). *See also Robins v. Day, 954* F.2d 679, 684 (11th Cir. 1992).

Plaintiff has claimed that the inadequacy of the discovery requires vacating the arbitrator's decision. He has not supported this allegation with any authority. After a diligent search, the Court could find no authority to support this position. 9 U.S.C.A. § 10 provides the limited authority of district courts to vacate an arbitration award when, as is relevant to Plaintiff's complaint on this point:

> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

Plaintiff has not shown that he has been prejudiced by the arbitrators' failure to extend discovery to his liking.

Indeed, the Court finds that discovery *was* sufficient to enable the arbitrators to fairly weigh the case on its merits, and come to a just decision. Even if discovery would have been Less than this Court would have entertained, which is an issue that the Court does not today address, "fundamental fairness does not require that an arbitrator must hear any and all evidence a party may wish to offer, regardless of its length, repetitiveness or irrelevance." *Hunt v. Mobil Oil Corp., 654* F. Supp. 1487, 1513 (S.D.N. Y. 1987) (quoting *National Post Office Mailhandiers, etc. v. United States Postal Service,* 751 F.2d 834, 841 (6th Cir. 1985)) "[A]n arbitration panel is not subject to the more rigid procedural mechanisms that courts are. Arbitration panels have *great discretion* and courts have narrow review of their actions and decisions." *Flight Systems v. Paul A. Laurence Co., 715* F.Supp. 112 (D.D.C. 1989) (citations omitted). The panel's exercise of its discretion to cut off discovery when it did does not, based on the facts of this case, rise to the level of misbehavior.

Plaintiff was denied a continuance by the arbitrator. The granting of a continuance is not required by the Act, but is wholly within the discretion of the arbitrator, as the arbitrator is in the best position to determine what must be done procedurally to hasten the settlement of a dispute before him. The Court is unwilling to tell the arbitrator how his duties are to be performed. As a further observation, even in the absence of an arbitration agreement, had the case been brought in this Court, Plaintiff would enjoy no innate right to a continuance until a time of his choosing. The time demands on the courts far exceed their faculties to

respond to them in such a manner as to allow the luxury of a free-floating docket for Plaintiff. The same is also true for arbitrators.

The Plaintiff cannot now complain of the arbitrators' alleged lack of qualifications to decide the dispute, as he did not at the time when it would have been most prudent to do so, at the beginning of the arbitral proeeeding. Plaintiff's "wait and see" approach is not well-taken by the Court: as he was informed of the arbitrators' qualifications at the beginning of the proceeding, the proper time to object was *at that time. Satteifield v. Edenton-Chowan Board of Education,* 530 F.2d 567 (4th Cir.) (Black plaintiff sued school board for discharging him, allegedly due to the board's racial animus.

Among other things, plaintiff argued that the school board was "disqualified to have the hearing." The Court responded, "When plaintiff and his counsel, with knowledge of the very grounds they now urge as a basis for disqualification, failed to raise that claim of disqualification until after the Board, at their request, had granted plaintiff a hearing, and had decided against the plaintiff the plaintiff lost any right to press the point later. *One must raise the disqualification of the trier, whether he be a judge, an administrator, or an arbitrator, at the earliest moment after knowledge of the facts.")* [Citations omitted.]

CONCLUSION

Plaintiff has raised numerous objections to the 'arbitration proceeding between himself and Defendant CIGNA, but finding none of them covered within the permissible bases for objection as contemplated by the text of the Act as well as its interpretation by the Courts, his objections are found to be without merit, and his motion to vacate the arbitral decision is therefore DENIED. Concomitantly, Defendants' motion is GRANTED.

SO ORDERED this 8 day of August, 1997.

/s/Joe Kendall
U.S. District Judge

No. 3:94-CV-0968-X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ARTHUR H. WILLIAMS
Plaintiff,

vs.

CIGNA FINANCIAL ADVISORS, INC./CIGNA INDIVIDUAL FINANCIAL SERVICES, and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendants.

Filed Aug 27 1997

FINAL JUDGMENT

By Memorandum Opinion and Order filed August 11, 1997, the Court granted the Defendants' Motion to Confirm Arbitration Award, and hereby issues its Final Judgment.

The arbitration award entered by the NASD arbitration panel, NASD Case No. 95-04380 that arose out of Case 3:94-CV-0968-X is hereby CONFIRMED.

It is ORDERED, ADJUDGED and DECREED that Plaintiff Arthur Williams take nothing by this action and that his complaint be DISMISSED with prejudice. It is further

ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants

CIGNA Financial Advisors, Inc., CIGNA Individual Financial Services and Connecticut General

Life Insurance Company against Plaintiff Arthur Williams in the amount of $18,945.00.

Defendants are awarded pre-judgment interest at the highest rate allowed by law from the date that the arbitration award was rendered. Post-judgment interest shall accrue at the rateof 5.58% pursuant to 28 U.S.C. § 1961. Costs of court as calculated by the clerk of court are taxed against the Plaintiff.

The Clerk is directed to prepare all writs necessary for collection of this Judgment.

SO ORDERED this 25th of August, 1997.

/s/Joe Kendall
U.S. District Judge

STATUTORY PROVISIONS INVOLVED IN THIS CASE

29 U.S.C. §623(d) provides, in relevant part:

"It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

29 U.S.C. §626(f)(1) provides, in relevant part:

"(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this chapter; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual

> already is entitled; the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; ... (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

29 U.S.C. §626(f)(3) provides, in relevant part:

> "In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1) ... have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1)."

Pub. L. 102-166, §118, reprinted in notes 42 U.S.C. §1981,

> provides, in relevant part: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal Law amended by this title [... amending ...

Section 626 of Title 29, Labor]."

9 U.S.C. §1 provides, in relevant part:

"'commerce' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, ... but nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

9 U.S.C. §2 provides, in relevant part, that a:

"written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."